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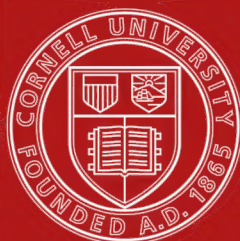
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A  
SELECTION OF CASES  
ON  
PRIVATE CORPORATIONS.

BY  
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IN TWO VOLUMES.

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## PREFACE.

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WHEN Professor Cumming was preparing his "Cases on Private Corporations," in 1892, the list of cases then in use on that subject at the Harvard Law School was placed at his service, with the understanding that the same list was liable to be used by me, at any time after one year, in preparing a selection of cases on the same subject. Such use has now been made of that list. This explains the similarity between Professor Cumming's book and the present work,\* in regard to the cases selected on some topics.

JEREMIAH SMITH.

APRIL, 1897.





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# SELECT CASES

## ON

### PRIVATE CORPORATIONS.

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#### CHAPTER I.

#### DEFINITION OF CORPORATION.

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#### LIVERPOOL, &c. INSURANCE CO. v. MASSACHUSETTS.

1870. 10 *Wallace*, U. S. 566.<sup>1</sup>

ERROR to the Supreme Court of Massachusetts. Bill in equity by State of Massachusetts to collect a tax, and to restrain company from doing further business till the tax was paid.

One question raised in this case was, whether the above Insurance Company is a corporation within the meaning of the Massachusetts Statute imposing upon each fire, &c. insurance company "incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent upon all premiums charged or received on contracts made in this Commonwealth for insurance of property." The facts as to the nature of the company are sufficiently stated in the opinion.

The Supreme Court of Massachusetts decided that the company was liable to the tax. 100 Mass. 531 [*Oliver v. Liverpool, &c. Ins. Co.*].

*B. R. Curtis* and *J. G. Abbott*, for insurance company.

*Charles Allen*, Attorney-General of Massachusetts, for State.

MR. JUSTICE MILLER. . . . . These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit, which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament, which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half-century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, &c., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legis-

lative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a

corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

*Judgment affirmed.*

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THOMAS v. DAKIN.

1839. 22 Wendell, 9.<sup>1</sup>

IN the Supreme Court of New York. Action brought by plaintiff Thomas as president of Bank of Central New York, an association formed under the General Banking Act of April 18, 1838, to recover several demands alleged to be due to the institution. The declaration alleged the indebtedness to be to the bank, and the promises to have been made to the bank; concluding to the damage of the bank of \$10,000; and, therefore, the said plaintiff, as president of the Bank of Central New York, brings suit, &c.

Demurrer to declaration; assigning, in substance, the following special causes:—

1. Plaintiff Thomas has no cause of action.
2. No authority exists in law for plaintiff to sue on behalf of the bank, or upon promises made to the bank.
3. No association of persons not incorporated are entitled by law to bring an action in the name of their president, but only in their individual names.
4. The General Banking Act of 1838, so far as it purports to authorize this suit, is unconstitutional; and also is void because it did not receive the assent of two-thirds of all the members of the legislature.

The Constitution of New York, article 7, section 9, is as follows: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill . . . creating, continuing, altering, or renewing any body politic or corporate."

<sup>1</sup> Statement abridged from facts stated by reporter and from facts stated in the opinions. The arguments are omitted; also the greater part of the opinions.—Ed.



The provisions of the General Banking Act of 1838 are sufficiently stated in the opinion of NELSON, C. J.

*C. P. Kirkland*, and *S. A. Foote*, for plaintiffs.

*Ward Hunt*, for defendant.

NELSON, C. J. . . . Are these associations corporations?/// In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term *corporation* in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders that a corporation aggregate is an artificial body of men, composed of divers individuals, the *ligaments of which body are the franchises and liberties bestowed upon it*, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the *powers and faculties*, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very early day: since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them at this day will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a *common seal*, or to *make by-laws*, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary, in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which a *perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfilment of the objects of the association as a single individual*. In this way a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in affecting it, the operation is conducted with the simplicity and individuality of a natural

person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various, — limited or enlarged at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have a perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, &c. The 15th provides that any number of persons may associate to establish offices of discount, deposit, and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The *name* to be used in the business; 2. The *place* where the business shall be carried on; 3. The *amount* of capital stock, and number of shares into which divided; 4. The *names of the shareholders*; 5. The *duration* of the association. The 18th confers upon the persons thus associating the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier, and such other officers and agents as may be necessary. By the 21st and 22d sections, contracts, notes, bills, &c., shall be signed by the president and cashier; and all suits, actions, &c., are to be brought in the name of, and also against the president for the time being; and not to abate by his *death, resignation, or removal*, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, &c., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer, shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the *death or insanity* of any shareholder.

1. Upon a perusal of these provisions, it will appear that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed,

is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, &c., loans money, sues and is sued, &c. It is true some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, &c., and another in which to sue and be sued, so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. 2 Bacon's Abr. 5; 2 Salk. 451; 2 *Id.* 237; Ld. Raym. 153, 680. The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither *sale* of shares or *death* of shareholders affect it; if one should sell his interest, or die, the purchaser or representative by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, *sub.* 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name, and in an artificial

form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "*to exercise such incidental powers as shall be necessary to carry on such business*" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution.

[After considering other questions, the learned judge concludes as follows:—]

Upon the whole, I am of opinion: 1. That these associations are corporations; 2. That the legislature possesses no power to pass a general law like the one under consideration by a *majority bill*; and 3. That they may pass it by two-thirds of the members elected.

The plaintiff is therefore entitled to judgment on the demurrer, with leave to amend on the usual terms.

[COWEN, J., gave an elaborate opinion, concurring with NELSON, C. J., on points 1 and 2. As to point 3, he inclined to agree with NELSON, C. J. His opinion concludes as follows:—]

But this branch of the argument need not be pursued; for it was agreed on both sides, at the bar, that we must, on this record, presume the general banking law to have been passed by two-thirds of all the members elected to both houses. We must clearly do so until the fact is denied by plea. The requisite constitutional solemnities in passing an act which has been published in the statute book, must always be presumed to have taken place until the contrary shall be clearly shown. Should the defendant withdraw his demurrer, and plead specially that the law in question did not receive the assent of two-thirds, as required by the Constitution, it will then be in order to pass upon the validity of such an objection.

Being clear that the plaintiff's declaration is sufficient in substance, and that he has technically and aptly set forth his cause of action according to the statute, I think there should be judgment for him with leave to withdraw the demurrer, and plead on payment of costs.

BRONSON, J. I concur fully in the opinions expressed by my brethren, that associations formed under the general banking law are corporations, and that the assent of two-thirds of all the members elected to each branch of the legislature was necessary to the passing of the act. But, as at present advised, I cannot concur in the opinion that the legislature has the constitutional power, although two-thirds may assent, to provide by a general law for the creation of an indefinite number of corporations at the pleasure of any persons who may associate for that purpose.

It was conceded on the argument, that the demurrer does not reach the objection that the act was not passed by a two-thirds vote; and I have not, therefore, considered the question whether we can look beyond the statute book. A plea may render it necessary for us to pass upon that question.

*Judgment for plaintiff.*

WARNER v. BEERS, PRESIDENT OF THE NORTH AMERICAN TRUST  
AND BANKING CO.

BOLANDER v. STEVENS, PRESIDENT OF THE BANK OF COMMERCE  
IN NEW YORK.

1840. 23 *Wendell*, 103.<sup>1</sup>

IN the Court of Errors of the State of New York. Demurrers to declarations, raising substantially the same questions as in *Thomas v. Dakin*, 22 *Wendell*, 9 [*ante*, p. 4]. The Supreme Court gave judgment in both cases for the original plaintiffs, Beers and Stevens; referring for reasons to the opinions delivered in *Thomas v. Dakin*. Both causes were removed by writs of error to the Court for the Correction of Errors.

*L. Sanford* and *J. A. Spencer*, for plaintiffs in error.

*W. C. Noyes* and *S. A. Foote*, for Beers.

*W. Kent* and *D. B. Ogden*, for Stevens.

[Opinions, which are reported in full, were delivered by BRADISH, President of the Senate, WALWORTH, Chancellor, ROOT, Senator, and VERPLANCK, Senator. "A brief analysis" of these opinions may be found in a prefatory note by the reporter, 23 *Wendell*, p. 103. Portions of the opinion of VERPLANCK, Senator, are as follows]:—

VERPLANCK, Senator. [The learned Senator dissented from the view of the Supreme Court, that the Court were bound, until the fact is denied by plea, to presume that the General Banking Law was passed by a two-thirds vote. He was of opinion that the Court, in deciding upon the demurrer, should ascertain whether the Act received a two-thirds vote; and that, if it were found that the Act received less than a two-thirds vote, it would then be the duty of the Court to inquire whether the provisions of the Act were such in themselves as to bring the case within the constitutional requirement. After some discussion of other topics, the opinion proceeds as follows]:—

. . . What, then, is a body corporate? What is its necessary and *essential* meaning? "It is called a body corporate," says Lord Coke, "because the persons composing it are made into one body." "It is only *in abstracto*, and rests only in contemplation of law." 10 R. 50. So again, he says, 1 Inst. 202, 250, "Persons capable of purchasing are of two sorts, — *persons* natural created of God, and *persons* created by the policy of man, as persons incorporated into a body politic." If, leaving the quaint scholastic teaching of the father of English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. "A body corporate is an artificial being, invisible, intangible, existing only in contemplation of law. Being the

<sup>1</sup> Statement abridged. Arguments omitted; also part of opinions. — Ed.

creature of law, it possesses only the properties conferred upon it by its charter. Among the most important of these are immortality, and, if the expression may be allowed, *individuality*." 4 Wh. R. 636; 1 Peters R. 46. Again: "It is precisely what the act of incorporation makes it; derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act authorizes." "Within the limits of the properties conferred by its charter, it can," says Blackstone, "do all acts as natural persons may." "In corporations," says Professor Woodeson, "individuals are invested by the law with a political character and personality wholly distinct from their natural capacity." "A corporation," says Kyd on Corporations, 13, "is not a mere capacity, but a political person in which many capacities reside." Thus, then, the essential legal definition that covers the whole ground, and expresses the very essence of the being of a body corporate, is this: "It is an artificial legal person, a succession of individuals, or an aggregate body considered by the law as a single continuous person, limited to one peculiar mode of action, and having power only of the kind and degree prescribed by the law which confers them." Such is the established notion of our common law. . . .

So far was this principle of corporate personality carried in our old common law, that reasons were expressly assigned why a corporation could not be excommunicated or punished for crime. "Because it has no soul," said Lord Coke, which, however ludicrously it may now sound, was but saying quaintly, and in the style of that day, what in modern times would be expressed by saying that a corporation, being an artificial and not a moral person, must be incapable of guilt. The very able argument in the celebrated historical case of the charter of London in 1682 went a good deal into these refinements, and it was held on one side that a political person had a mind and reason, according to Lord Chief Justice Hobart, and that its reason was expressed by its by-laws; whilst the attorney-general, whom Bishop Burnet has egregiously wronged in calling him "a hot, dull man," argued most acutely, as well as very learnedly, in support of the capacity of a corporation to incur political, if not moral, guilt and punishment.

All these, it is true, are refinements of technical reasoning, in a taste and fashion of thought which have passed away; but they prove conclusively how strong and undoubted was that legal principle of personality upon which these mere inferences and nice distinctions were founded.

In order to continue the existence of such an artificial person, perpetual succession is ordinarily necessary, though it was not strictly essential, for it may be confined to any given number of lives in being, holding in a sort of corporate joint tenancy, of which I think examples may be found. As a legal person, it has only the powers and properties specifically conferred upon it; and can possess and exercise no others, except such as are absolutely necessary to the exercise of the powers expressly given. This is the enactment of our revised statutes,

which, as our revisers rightly said in their report on that title of the law, is "declaratory of a principle of law frequently recognized by our courts, and which it was deemed useful to confirm by legislative authority." To these are added certain legal incidents by the common law, also declared in our statute, and common to all corporations, as to sue and be sued, hold and convey real and personal property, to appoint officers for its services, and to make by-laws for the management of its affairs. To these more important rights the law adds the external evidence of a name and a common seal. This last, though apparently a matter of form, is not without effect, any more than the legal consequences of seals to instruments in England and this state, so widely different from those of other legal systems, where the distinction between sealed and unsealed instruments is unknown. It is only through a common seal and name that any grant of lands, or covenant touching them, can be made by a corporation.

There are several very useful and beneficial accessory powers, or attributes very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures, than those which are essential to the being of a corporation. Such added powers, however valuable, are merely accessory. They do not in themselves alone confer a corporate character, and may be enjoyed by unincorporated individuals. Such a power is the *transferability of shares*, whereby investments may be made, without the owner losing the future control of his funds under changes of circumstances. Such, too, is the *limited responsibility* by which the stockholder, having once fairly paid up his share of the capital, is exempted from further personal liability. So, too, the convenience of holding real estate for the common purposes, *exempt from the legal inconveniences of joint tenancy or tenancy in common*. Again: there is the continuance of the joint property for the benefit and preservation of the common fund, *indissoluble by the death or legal disability* of any partner. Every one of these attributes or powers, though commonly falling within our notions of a moneyed corporation, is quite unessential to the legality of a corporation, may be found where there is no pretence of a body corporate, nor will they make one if all were combined, without the presence of the essential quality of legal individuality. This distinction has been observed and marked by Mr. Kyd, *Kyd on Corporations*, 13, with logical acuteness and precision: "A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises. It is to a franchise as the substance to its attribute. It is something, to which many attributes belong, but it is itself something distinct from those attributes."

Thus, the transferability of shares is not essential to a corporation. For instance, it does not enter into the constitution of our chartered colleges, academies, hospitals, and other corporate institutions founded

by public endowment, or private beneficence. It does not enter into the charters of incorporated scientific and literary societies for mutual benefit or charity, in the funds of which the members have a beneficial interest. On the other hand, such a right of transfer may be incorporated into partnership articles, and become a fundamental condition of them. The general rule, in absence of any express stipulation, is indeed the reverse of this, and in practice it is comparatively rare amongst us. Hence it has become common to consider such transferability as a clear indication of a corporate character.

[After referring to the joint stock companies authorized by statutes in England, the opinion proceeds.] But, on this head of transferability, we need not rely upon English authority in our own usages and decisions.

In the articles of the Merchants' Bank Association, before our restraining act, a similar transferability of shares was provided, and these articles have the authority of Alexander Hamilton for their validity. I shall have occasion to refer to them more fully hereafter.

So again, in the case of the Albany Exchange, before it received its present charter, the validity of the partnership or joint stock company for a public enterprise, with transferable shares, was expressly recognized. *By the Court*, — COWEN, J. "The objection taken on the argument, that this association was illegal, as being in the nature of a corporation, issuing scrip and providing for a *transfer of stock*, is not well founded. The act of associating in this way is, we think, properly characterized by the exception taken at the trial. It constitutes a partnership valid, as being formed for the purposes of a lawful, honest enterprise." *Townsend v. Goewey*, 19 Wendell, 427. The learned judge then refers to and adopts the authority of Collyer on Partnerships, p. 624, and the cases he cites.

Again, this transferability may be found in many sorts of trusts. A well-known instance of this may be seen in the Tontine of New York, originally built for the purposes of a Merchants' Exchange. It is a trust of real estate, with transferable shares as personal property; it was originally settled by the most eminent counsel of this state, and its validity has been attested by nearly fifty years' experience, during which above two hundred shares have passed through courts, assignments, insolvencies, bankrupt commissions, distributions of estates, &c., without their legal transferability having ever been impeached. See printed articles of the Tontine, N. Y., 1793.

In both of these last examples, as in other instances of trusts and partnerships, lands were held exempt by operation of law from the legal incidents of joint tenancy, or tenancy in common, and the estate continued for the common purposes. This has been noted as a mark of corporate character; yet most corporations are limited in the extent of its exercise, some are expressly excluded from the privilege, and very many exist legally without its actual exercise or enjoyment.

The non-dissolution by death or by legal disability is also noted in



the opinion of the supreme court in these cases as a mark of a corporate body. But that also may be found in the trusts just mentioned, and others of a similar nature, and it may be adopted as an article of ordinary partnership. It is the settled law of England that it may be stipulated that death shall not dissolve the partnership, and further, that the executors of the deceased shall become partners. Collyer on Part., p. 5, 648; *Pease v. Chamberlain*, 2 Vesey R. 33; *Haggarman v. Spears*, 7 Pick. R. 235; *Wrexham v. Huddleton*, 1 Swanst. 514.

Again: a common name has been regarded as a corporate criterion. To this Lord Ellenborough gives a full answer in *Rex v. Webb*. "As to the fourth point, that the subscribers have presumed to act as if they were a body corporate, — how is this made out? It was urged that they assumed a common name, that they have a committee, &c. But are these the unequivocal evidence and characteristics of a corporation? How many unincorporated assurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being of itself the distinctive and peculiar criterion of a corporation?" Thence he infers that "these subscribers have not acted peculiarly as a body corporate." *Rex v. Webb*, 14 East's R. 406.

But perhaps, in the general and popular understanding, the most familiar distinction between corporate bodies and common partnerships, or other joint undertakings, is the exemption of the associates from personal liability beyond the actual amount of their respective proportions of the capital. The regarding this very frequent and important incident of a corporation as an essential characteristic seems not to be confined to popular opinion. Judge Cowen says, in the decision of the cases now before us: "Among other peculiar privileges conferred on these associations, and not enjoyed by natural persons, I allude to that of the exemption of members from personal liability for debt. This is mentioned by Angell & Ames, in their treatise, as peculiar to a private corporation; they notice it as a striking characteristic between a corporation and a partnership." Yet our own statute of limited partnerships affords sufficient evidence that an alteration of the existing law may be made by statute, so as to exempt from personal liability beyond the stipulated share in the joint funds, for the debts of a firm, without the remotest thought of converting such firms into bodies corporate. Besides, the right of making a contract, whereby those who tender it stipulate not to be bound beyond the amount of some specific pledged fund, must be a natural right growing out of the very nature of contracts. If a company or association, or an individual, offers to contract to make certain payments only to the amount of certain specific funds, and others choose to accept that contract on those conditions, there can be nothing to prevent the validity of such a contract, except some positive rule of law founded on policy or an arbitrary enactment. In the absence of such a restriction, it is and must be good. Such a limi-

tation, then, must be binding on all who accept the conditions. The policy of our law and the usages of business have, indeed, rightly fixed the presumption the other way, so that the stipulation and the burden of proof of the limited indebtedness are thrown upon those who expect to be benefited by them. This right has been substantially admitted by the highest tribunal in Great Britain, in the case of *Minnet v. Whinnery*, 3 Brown's Parl. Cas., 323, and it was held to be good by Lord Ellenborough, in *Alderson v. Clay*, 1 Camp. 404. The doctrine has been received as settled law by one of the best elementary writers of the day, often cited by our own supreme court. "When a creditor," says Collyer on Partnership, 214, "has notice, that by an arrangement between partners, one of them, though appearing to the world as a partner, shall not participate in the loss, and shall not be liable for it, the creditor will be bound by the arrangement."

The original articles of the Merchants' Bank in the city of New York, as an unincorporated association, with limited *liability*, as well as *transferable shares*, which were read in argument by Mr. Kent, have the great professional authority of Alexander Hamilton, who prepared them, and of the many eminent men who joined in them, and whose professional distinction gives to their approbation the character of a sort of judicial sanction; whilst the restraining act passed soon after proves, as was unanswerably argued, that the legislature and its legal advisers considered such a voluntary association, thus restraining its own liability, not as a violation of common law, but merely as contradicting the financial policy of the State.

A similar analysis of such of the customary accessory powers of specially chartered moneyed corporations as, from being most conducive to ends of profit or convenience, are ordinarily considered as the essential qualities constituting corporations, will show, that all such powers or incidents are merely convenient and desirable authorities or modes of action, added to and engrafted upon the creation of a body politic; not the legal attributes absolutely essential to a corporation, and denoting its existence as such.

Amongst us, as in England, bodies politic or corporate may exist where the ultimate personal liability is still retained. The personal liability is indeed suspended in such cases, and for a time merged in that of the artificial corporate person; but there may be an ulterior recourse to the corporators when the former fails. Many corporate banks in other states are so constituted, and with us some chartered companies for insurance, &c., some for an indefinite, others to a limited extent beyond the capital. Corporate bodies may exist also without transferability of the rights of the corporators; for a large majority of our literary and charitable, as well as all our municipal corporations, are so. On the other hand, by our own common law as it would exist now, independently of statutory restrictions, associations might be formed and trusts created, having every one of the above enumerated characteristics, which have been insisted upon as essential to a

corporation, except that personality which I before stated as forming its strict and necessary essential legal definition. The present joint-stock companies of England afford pregnant examples, showing how many of these attributes may be embodied in voluntary associations which are confessedly not corporations.

In fact the line may be very faint, and depending wholly upon the purely legal and technical character conferred, whether a joint stock association or a trust, freed by law from certain positive restraints imposed by our modern statutes, be a corporation or not. The Tontine trust, before mentioned, is managed by directors annually elected by stockholders; its real estate is held by trustees, continuing their trust from hand to hand during the lives of the original nominees and the survivors of them, with transferable shares, and wholly without personal liability. For the reasons already stated, the eminence of the counsel (the late R. Harrison) who prepared the trust, and the frequency with which its legal character must have passed in review before lawyers and courts, and always without objection, it may well be regarded as sanctioned judicially. It is a valid trust. Add to it a legislative charter, making the associates a body corporate and no more, what then is the effect? Simply to give a different technical character, an artificial *individuality*, in Chief Justice Marshall's phrase, a different mode of standing in courts.

Such was the actual history of the Albany Exchange. It was a joint stock company, formally decided to be valid. 19 Wendell's R. 427. A year or two after (1837) it appears by our statute book to have been incorporated. But there is probably but little difference, besides the greater convenience of the corporate body, between the former organization and the present.

The trusts specially permitted by an act of last year, Statutes of 1839, chap. 174, for the benefit of that singular people called *Shakers*, were nothing more than exemptions from the recent restrictions of trusts. They were authorized to continue, enlarge and manage their property, by trusts, as they had done before the change in that title of our law effected by the revised statutes. Had the law, in addition to this, made every Shakers' United Society a body corporate, without otherwise varying the original trust, the only change would have been the conversion of a trust into an artificial legal person, with the same effect substantially as to the interests of those beneficially interested.

Our act for general religious incorporations regulates the incorporation of churches of all religious denominations (other than those provided for in the first and second sections) by trustees, who are to be a body corporate.

Those who have had occasion to look into the mode in which dissenting religious trusts are held in England, as I presume they were, in the same manner, in New York, when a colony, will, I think, perceive that our statute adds little more than a convenient corporate character to powers elsewhere, and formerly here, exercised under trusts.

All these considerations lead me to the conviction that, for the purpose of constitutional interpretation, we must look to the strict legal meaning of the phrase *body politic or corporate*, and not to those circumstances or adjuncts which amount only to descriptions of the manner in which such bodies are very frequently constituted when used for purposes of profit. If this be regarded as a very strict rule of interpretation, let it also be remembered that it is applied where such strictness is most appropriate, in the interpretation of a provision restraining the general sovereign power of the state expressing the public will through a majority of the people's representatives. . . .

The most peculiar, and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence. Now this is *not* found in the associations under the act. A *corporation* can sue and be sued only by its corporate name. It can act only according to the letter of the law creating it. "It derives all its powers from that act," says Chief Justice Marshall, "and is capable of exercising its faculties only in the manner which that act authorizes." It has no natural powers which, in its discretion, it may exercise or not. It can exercise none of those other powers, and possesses none of those other rights which the individuals composing it could possess and exercise, were it a mere society or partnership. Not so as to these *associations*. By this act, suits on behalf of such associations *may* be brought in the name of the president. Persons having claims against the company *may* maintain their actions against the president. But there is no reason, except that of mere convenience, why the association may not also sue and be sued under their several real names, as other partners may. This reason of convenience, it is obvious, would not apply where the company was composed of a few persons, as if, for example, one of our great banking firms were to come under the law.

It was indeed argued that the technical construction which gives to *may* the meaning of *must* or *shall*, applies here. But that construction holds only when there is a previous duty, to which the statute adds some new power or authority, as in the case of a public officer; or where from other reasons it is manifest that (to use Judge Story's words) "the legislature meant to impose an absolute duty, not to give a discretionary power;" otherwise, as he says, "the ordinary use of language must be presumed to be intended, unless it would defeat the the provisions of the act." 1 Peters R. 64. The ordinary popular discretionary sense of the word *may* is also the ordinary legal one. The other is the exception. In our revised statutes the words *may* and *shall* are so used and distinguished. So they are in our annual legislation, as when it is said of a company that it *may* hold real estate, *may* take a certain rate of tolls, *may* borrow money.

Moreover, here the right to sue and be sued, as other partners, is a common-law right, and cannot be taken away by mere implication.

“A statute made in the affirmative, without negative words,” say the highest authorities, “does not take away the common law.” 2 Inst. 200. See also Dwarris on Statutes, 637, and the authorities there referred to. . . .

Again: these associations do not act by a corporate name and seal, but by another mode familiar to our law. They can contract through their president, as a limited partnership must through its general partner. They are authorized to sue and be sued through him; as Judge COWEN observes, “The power of the legislature to give a right of action to one man in his own name for a debt due to another has always been exercised from our earliest legal history, and it is now too late to call it in question.” I refer to the several legislative and judicial authorities which he has collected in his opinion on these cases. They cannot hold real estate as a corporation does, or contract concerning it by their own name and common seal; but, like partnerships, they can have an equitable and beneficial interest in land. Collyer, 70, 76. Their president takes as a trustee, and the associates are but beneficiaries. . . .

How then are these associations to be regarded in legal contemplation?

I assent fully to the conclusive reasoning of the counsel, who chiefly pressed this part of the argument (Mr. Kent), that they are copartnerships relieved from the inhibitions of the restraining act, and thus allowed to carry on banking business under certain conditions. The policy of the state has prohibited its citizens from issuing paper for circulation as money, or from associating together for certain banking purposes. 1 R. S. 711. It reserved those privileges for corporate banks. The act to authorize the business of banking repealed that prohibition *pro tanto*, as to all individuals or companies who would comply with its conditions. The associations in question are partnerships complying with those conditions, and thus exempted, as any other citizens may be on the same terms, from the operation of a statutory restraint of general right, which is still binding on all who will not comply with the conditions. This is so far in close analogy to the law of special partnership, where exemption from the general liability imposed by the law is tendered to all who comply strictly with the provisions of the statute. The articles and certificate in this act correspond to the certificate setting forth the names of partners, amount of capital, time of termination and nature of business, required by the title of “Limited Partnerships,” 1 R. S. 764, and with the articles which every such copartnership must have. The general partner there is authorized to transact business and contract for the rest; so, though with less authority, is the president here. The mode of suing and being sued is precisely the same in both cases. . . .

On the question being put, *Shall these judgments be reversed?* all the members of the court, with but a single exception (*twenty-three*

being present), voted in the *negative*. Whereupon the judgments of the supreme court were *AFFIRMED*. The court thereupon adopted the following resolutions:—

1. “Resolved, That the law entitled ‘An act to authorize the business of banking,’ passed 18th April, 1838, is valid, and was constitutionally enacted, although it may not have received the assent of two-thirds of the members elected to each branch of the legislature.” This resolution was adopted by a vote of 23 to 1.

2. “Resolved, That the associations organized in conformity with the provisions of the act entitled ‘An act to authorize the business of banking,’ passed April 1st, 1838, are *not* bodies politic or corporate, within the spirit and meaning of the constitution.” This resolution was adopted by a vote of 22 to 3.<sup>1</sup>

# BRONSON, J., IN PEOPLE v. ASSESSORS OF WATERTOWN.

1841. 1 *Hill, New York*, 620–623.

“A CORPORATION aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person.” It does not occur to my mind that anything else can be essential to the definition. Such a union as I have mentioned can only be effected under a grant of privileges from the sovereign power of the state. A corporation is therefore said to be a legal being, or the mere creature of law. It is convenient, though not absolutely necessary, that this artificial person, like a natural one, should have a name by which it may be known and designated in the transaction of business.<sup>1</sup> And when the doctrine was that a corporation could only contract by its seal, a seal was said to be an indispensable requisite. So immortality was once thought to be an attribute of all corporations; but that now means no more than a continued succession of members for such period, whether long or short, as may be allotted to this legal entity by its creator.

Now, a banking association, formed under the law of 1838, not only may, but it must have a name; and a seal, though far from being essential to the existence of a corporation, is nevertheless an incident to the grant of corporate privileges, though not mentioned in the grant. This is not only so at the common law, but by the statute also. 1 R. S.

<sup>1</sup> As to the reasons for adopting these “resolutions,” and as to the effect of the same, see the elaborate explanation of WALWORTH, Chancellor, in 2 Denio, pp. 382 to 386. But compare BRONSON, J., in 1 *Hill*, pp. 618 to 620. — *Et.*

599, § 1. The right to sue and be sued is expressly conferred on these associations; and whether the suit is brought in the name by which the company transacts its other business, or with the addition of the name of its president, cannot be material. A corporation may have one name for one purpose, and another name for another purpose. And besides, the general banking law only provides that actions *may* — not that they *shall* — be brought in the name of, or against the president; and the right to sue and be sued, like that of having a common seal, is not only a common-law incident to the grant of corporate powers, but the legislature has expressly provided that this power shall vest in every corporation, although not specified in the act under which it shall be incorporated. 1 R. S. 599, §§ 1, 2. We have already held, more than once, that these associations may sue or be sued in the same corporate name by which their other business is transacted.

The individuals composing these associations are united in one body, and the members lost in the corporate existence. It is not the individual members, but the legal being which acts and transacts business. A continued succession of members, without changing the identity of the body, is also as completely secured to these institutions as it ever was to any other corporation. As to the period or duration of this continued succession, they surely have scope and verge enough. I observe from the articles on file, that one of these associations has agreed to live about five thousand years, and there is nothing in the general bank law to prevent the associates from writing eternity, instead of time, as the period of corporate existence. It is true that the association may come to an end somewhat short of the mark, and the one to which I allude has, I believe, already expired, but that was no fault of the charter.

What I had specially in view in adding anything to what has already been said upon this question, was to bring the matter to a single and very plain test. Take one of these associations when formed pursuant to law, — say the Bank of Commerce in the city of New York, — and compare it with its neighbor, the Bank of America, which has a special charter from the legislature; and then I have yet to learn what corporate capacity the one wants which the other has. No man can, I think, point out a substantial difference in the nature or essential attributes of the two institutions. The individual members are as completely merged in the legal body, and a succession of members is as effectually secured in the one case as in the other. In both cases it is the body, by means of its officers and agents, and not the individual members, which acts and transacts business. If the one is not a corporation, the other is not a corporation.

We must not examine the charter of these associations in detached parcels, and say that neither this power nor that makes a corporation. It is quite easy when the parts of a time-piece have been separated, to place the finger upon each wheel in succession and say, This is not a clock; but let the parts be again combined, and the machine be set

in motion, and it will then require some hardihood to deny that it is a clock. We must look at these associations as they appear when formed and in action, and then they fall nothing short of that legal entity which has hitherto been called a corporation. Others may doubt this. I cannot.

The principal difference between a safety fund and a free bank consists in the fact that the latter has larger privileges than the former. But whether a corporation or not, does not depend upon the number or magnitude of its powers, nor the manner in which they were conferred. An association under our general laws for a village library, or to tan hides, possesses all the essential attributes of a corporation in as great perfection as the Bank of England or the East India Company. Nor is it important in what mode, or by what name or particular agency, this artificial being transacts its business. It is enough that it has a capacity to act in some form as a legal being.

It may be true, as has been argued, that the legislature intended to make a legal being, and give it all the essential attributes of a corporate body, and yet that it should not be a corporation. That, the legislature could not do. I do not refer to any *written* constitution. The constitution of things — the order of nature — forbids it. Human powers are not equal to the task of changing a thing by merely changing its name.

## HAND, SENATOR, IN GIFFORD v. LIVINGSTON.

1845. 2 Denio, New York, 395-398.

A CORPORATION, according to my understanding, is a franchise granted by government, by which the members merge their individual characters into one artificial legal existence. It seems to me that but two requisites are necessary, — that it should be authorized by government, and that the members should be combined into an artificial unity. We are sometimes told that corporations must have perpetual succession, a right to sue and be sued and to hold property; that they must have a common seal and power to make by-laws. Blackstone says these are inseparably incident to corporations; and our statute is to the same effect. 1 Bl. Com. 475; 1 R. S. 599. But these attributes are merely incidental to a corporation as such. It is not essential to the existence of a corporation that it should possess them all. Even as to succession, why would not an authority to particular individuals named in the act to assume a corporate name and act as a corporation in certain business during their joint lives, be a corporation? As to the right to sue and be sued, have a seal, and make by-laws, it was decided more than two centuries ago that these, if in the charter, were



merely declaratory, and were not necessary to create a corporation. 10 Rep. 32; 1 Roll. Abr. 513, b. 10; 3 Rep. 73; *Norris v. Staps*, Hob. 211; *Davenant v. Hurd*, Moor, 564; 2 Bac. Abr. Corp. D.; 1 Bl. Com. 475. Clearly no particular form of words is necessary to create a corporation. 10 Rep. 32; 3 *Id.* 73; 2 Danv. Abr. 214; 1 Roll. Abr. 513, b. 10. The case in 10 Rep. 30b, 31a, certainly seems to decide that a corporation may exist without all of these incidents. See also *Allen v. Sewall*, 2 Wend. 327; 6 *Id.* 348, s. c. in error, per Walworth, Chan. I suppose that at the present day there can be no dispute in this country but that the grant of a franchise must emanate from the government. Blackstone says that among the Romans a corporation could be formed by voluntary association; but this is denied in 1 Brown's Civil Law, 99. However this may be, it is now settled that all voluntary associations are no more than partnerships. Our law knows but two classes of such associations; corporations and partnerships. Even authorized joint stock companies in England are nothing more than partnerships. *The King v. Dodd*, 9 East, 516; 3 Ves. & B. 180; Wordsworth on Joint Stock Co. 110; 9 Barn. & Cress. 401; 1 *Id.* 74; *Keasley v. Codd*, 2 Carr. & P. 408, note; *Maudslay v. Le Blanc*, *Id.* 409, note; Coll. on Part. 626, 651; McCulloch's Com. Dic. Companies.

I have no doubt but that a corporation may be shorn of some of the incidents, by the power giving it existence. Indeed, we have made the members of manufacturing corporations personally liable to a certain extent. And on the other hand, in England at least, powers can be given to partnerships which are similar to some of those said to be incidental to corporations. *Steward v. Greaves*, 10 Mees. & Welsb. 711; *Beech v. Eyre*, 5 Mann. & Gr. 415. The criterion is not, whether there are not certain powers and rights that are common to both; but the great distinctive feature of a corporation is, that it is authorized by a law or grant to act as an artificial being, the several members of which constitute one person in law, and have but a single will.

Having discussed the nature of corporations, we are led next to inquire whether associations under the general banking law are corporations. This court has at least once, and the supreme court has repeatedly, declared that they are; and even the case of *Warner v. Beers* does not decide the contrary. Indeed, I understand that the learned chancellor could not in that case vote for the second resolution as first proposed, because it declared unqualifiedly that they were not corporations. Do they possess the attributes of corporations within the settled definitions of that term? To determine this requires an examination of the nature and powers of these institutions. They have their existence by an act of the government; the members are so combined as to lose their individual character, and they act solely as an artificial being; they have power to sue and be sued by an artificial name, and may use a common seal; they may appoint and remove officers, and can only act by those officers. The individuals cannot, as such, do any act to

bind the association. A member may be sued at law by the association: the individual members are not liable for the debts of the association, and they hold their interest by transferable shares. There is perpetual succession, and immortality, by which I understand that the association is not affected by a change of members or the death of any number of them less than the whole. In short, every quality and power, express and incidental, that has ever been attributed to corporations, appear to be given by the legislature to these associations. One or two of these powers are not expressly mentioned in the statute, but we have seen that they are always implied. If, then, they come into existence as corporations do, and have all the powers and qualities of corporations, can they be denied that character because the legislature has not called them corporations? The act does not declare that they shall not be corporations; and if it had, the essence of the thing could not be altered by an arbitrary change of name.

## CHAPTER II.

### DISTINCTION BETWEEN CORPORATION AND STOCK-HOLDERS.<sup>1</sup>

RUSSELL ET ALS., APPELLANTS v. TEMPLE ET AL., APPELLEES.

1798. *Supreme Court of Massachusetts.* 3 *Dane's Abridgment*, 108.

[PROBATE APPEAL.] In this case the heirs of Thomas Russell contended that his shares in Malden, Charles-river, Haverhill, Andover, and Merrimack bridges, in Middlesex canal, &c., ought to be considered as real estate, and his widow, afterwards married to Temple, ought to have only her dower for life in them. On the other hand, Temple and wife contended they were personal estate, and ought to be distributed as such, and she have one-third part forever. The strongest case among these, in favor of real estate, was the Middlesex canal, in which the corporation had a fee simple estate, or an estate forever, and a perpetual toll. By the statutes passed respecting this canal and real estate, the property therein was divided into 800 shares, and the shares in the canal, including the towing paths and wharves thereon, were made transferable and taxable as personal estate. This corporation also had power to hold real estate to the amount of £30,000, over and above the canal itself, and this appendant real estate was made taxable as real estate of the corporation in the several towns in which it lay.

It was argued (for the widow) that these shares were personal estate, for two reasons:—

1st. Because these estates can only exist in the corporation, which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage or repair it, and so must hold it entire; and that the corporation is a moral person to all the purposes of property. Its tenure is to their successors, or to their successors and assigns; these estates never can vest in or be divided among the individual members, to hold as tenants in common &c., in their private capacities. Only the corporation can forfeit the estate, and that only by forfeiting their charter; and only the corporation can be taxed for it on common law principles; and on these can it alone be taken in execution for the debts of the corporation; and on a dissolution of the corporation, “its

<sup>1</sup> The distinction is also discussed in various cases which are given under special topics treated of in subsequent chapters. — Ed.

lands revert to the grantor, or his heirs, and the debts due to or from it are totally extinguished ; so that the members of it cannot recover or be charged with them in their natural capacities." And a grant to a corporation can only be for its life or continuance. 2 Bl. Com. 484 ; 1 Lev. 239 ; 1 Bac. Abr. 510. The case of the *Royal Exchange Insurance Company v. Vaughan*, 1 Burr. 155, and Cowper, 79 to 86, *Gardner's Case*.

Second. Because the share is personal estate, though the corporation hold real estate ; for the individual member has no estate, but only a right to such dividends as the corporation, from time to time, assign to him. He is unknown on the grants made to it, and he cannot grant any part of the estate ; nor can he be taxed for it but by statute law ; nor can any private member of a corporation be distrained for a public concern of it ; his only remedy for his dividend is case in *assumpsit*, or an action on the case for a wrongful refusal or neglect to pay or allow him his part of the profits. 4 Wood's Con. 489, &c. ; Cowp. 85 ; Impney's Modern Pleader, 83 ; 1 Vent. 351, *Dutch v. Warren* ; 1 Stra. 406 ; same case, 2 Burr. 1011. So lands may be real estate in one, yet the trees or corn growing on them may be personal estate in another. *Lifford's Case*, 6 Co. 46 to 50 ; Imp. M. P. 167.

For the heirs it was urged that these shares were real estate, because it was said the estates were real in the corporations ; annexed to the soil ; and that if these estates in the corporations were real, the estates of the individual members in them followed their nature, and were real ; and that the frequent declarations of the legislature declaring such shares personal estate, at least shew a doubt : that when one has a right to receive rent, he has only a right to receive a sum of money ; yet it does not follow that his estate is not real estate, out of which his rent issues.

The judgment of the court was, that these shares were personal estate, and distribution was ordered accordingly. The principal reason of the decision appears to be, because the court considered that the individual member, or shareholder, had only a right of action for a sum of money, his part of the net profits, or dividends. And so the law has been held to be since this decision was made.

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## WILLIAMSON v. SMOOT.

1819. 7 *Martin, Louisiana*, 31.

APPEAL from the court of the first district.

MATTHEWS, J., delivered the opinion of the court. The plaintiff having caused an attachment to be levied on the steamboat *Alabama*, the St. Stephens Steamboat Company intervened in their corporate

capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

The questions to be decided are: 1. Is it proper for our courts of justice to recognize, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?<sup>1</sup>

II. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it, as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. Civ. Code, 88, art. 11.

The court is of opinion that the district court erred in disallowing the claim of the company.

It is therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steamboat the Alabama, and that she be released therefrom.

*Livingston*, for the plaintiffs.

*Duncan*, for the claimants.

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## PARKER ET ALS. v. BETHEL HOTEL CO. ET ALS.

1896. *Supreme Court of Tennessee.*<sup>2</sup>

**APPEAL** from Chancery Court of Maury County.

The Bethel Hotel Co. was incorporated, in 1880, under the general corporations act of 1875; and erected a building used partly for a hotel and partly for other purposes. Sept. 1, 1885, the Bethel Hotel Co. and Lucius Frierson conveyed to Mayes & Dodson the "hotel proper part" of the building, by deed signed "Bethel Hotel Company, W. D. Bethel, President; Lucius Frierson, Secretary and Treasurer; and Lucius Frierson." This conveyance was authorized by a vote of the stockholders at the last meeting ever held by them. No business seems to have been transacted by the corporation after this time. On or about Aug. 28, 1886, Frierson became the owner of all the stock of the company; but, both before and after that date, he pledged various shares as security for debts of his which are still outstanding. The stock so pledged was

<sup>1</sup> The opinion relating to Point I. is omitted. — Ed.

<sup>2</sup> The statement of facts is abridged from the opinion, contained in advance sheets furnished by the State Reporter. Portions of the opinion are omitted. — Ed.

not transferred on the books of the company. He used the remainder of the building as his own up to Jan. 12, 1892, when he executed a deed in his own name, purporting to convey to Webster, in trust, the real estate owned by the Bethel Hotel Company and certain stock in that company. The purpose of this deed was to secure the payment of certain debts owing by Frierson, preferring one creditor and providing for *pro rata* payment of the others. Most of the creditors of Frierson who had loaned him money on the stock of the Bethel Hotel Co. were not provided for in the deed of trust. Parker *et als.*, creditors of Frierson and pledgees of said stock, filed a bill in equity, praying (*inter alia*) to annul the trust deed to Webster. The cause was heard before the Chancellor of Maury County, and afterwards before the Court of Chancery Appeals, from which the case was taken to the Supreme Court.

*G. T. Hughes, Fussell & Wilkes, W. S. Fleming, Jr., Granbery, & Marks, and John T. Williamson*, for Parker.

*Figurs & Padgett, E. H. Hatcher, and W. J. Webster*, for Hotel Co.

J. C. BRADFORD, Sp. J. [After fully stating the facts and pleadings.] It may be regarded as settled, therefore, that the legal title to the property conveyed to defendant, Webster, was, at the date of that instrument, in the Bethel Hotel Company, where it had been, unquestioned and undisturbed, since 1880, the year of its incorporation and organization. Defendants insist that, although Frierson may not have been invested with the legal title, he, nevertheless, had such an equitable estate and interest as entitled him to sell and dispose of the property. In other words, that he was the real owner of the property, and, as such, had the absolute right to use or dispose of it.

This alleged equitable estate was not the creation of any deed or written contract, executed by the Bethel Hotel Company, or of any corporate act or resolution adopted by the stockholders or directors, which in terms referred to or defined it, but is rather the result and consequence of certain facts and conditions, the existence of which is affirmed by the defendants.

It is said that the Bethel Hotel Company, by the alienation of that part of its property built for and adapted to the uses and purposes of a hotel, deprived itself of the means of conducting a hotel business, and that, since 1885, the date of the sale to Mayes & Dodson, it had ceased to exercise its corporate franchises; that the stockholders, at the meeting held in September, 1885, passed a resolution, or agreed among themselves, that the corporation should go into liquidation, and that Lucius Frierson, being then the owner of all the capital stock of the corporation, became, in consequence, the equitable owner of all its property, with full power to use it or dispose of it in such manner as he might choose to do. The position of the defendants seems to be that all rights of the corporation in the property were extinguished, that it had ceased to be affected with any corporate uses, and that it belonged absolutely to Frierson.

The facts affirmed by defendants are not all of them exactly as found by the Court of Chancery Appeals. It is true that the corpora-

tion sold and conveyed the hotel part of its building to Mayes & Dodson, retaining only the stores and opera house, and never afterwards engaged in the business of owning and operating a hotel. Lucius Frierson was not the sole stockholder in 1885, when the hotel was sold, and did not become such until August 28, 1886, when he purchased the Bethel stock. His stock, or a large part of it, at that time and subsequently, was held as collateral security by other parties. It is not true that a resolution was ever adopted by the stockholders directing the liquidation or winding up of the affairs of the corporation, or that they were ever wound up. The facts, as found by the Court of Chancery Appeals on this point, are stated in its opinion in the following words: "It may be fairly inferred, though it does not distinctly appear in terms in the proof, that when the deed was made to Mayes & Dodson it was then understood between W. D. Bethel and Lucius Frierson, they then owning practically all, or nearly all, of the stock, that Bethel should take the proceeds of the sale to Mayes & Dodson, amounting to \$22,500, and a sufficient amount, in addition, from Lucius Frierson, personally, to make \$30,000, and for this he would transfer his stock, \$61,000, to Frierson, and that this arrangement was consummated, so far as it could be done without direct corporate action of the corporation itself, by the paper of August 28, 1886, made by Bethel to Frierson, and this is what they understood by the resolution to go into liquidation, there being no debts due by the corporation, and, following out this idea, from the date of the sale to Mayes & Dodson, Lucius Frierson proceeded to treat the property as his own, on the idea that he himself constituted the corporation. We do not think that he entertained the idea that the corporation was defunct, but simply that he was, himself, the corporation, and could do what he wished with the assets."

In considering the position of the defendants, that Frierson became the equitable owner of the assets of the corporation, we must, therefore, leave out of view the idea that there was any corporate action looking to a dissolution of the corporation and winding up of its affairs. Frierson's estate or interest in the property, if he had any, rests on the postulate that, in consequence of the nonuser of its franchises and his sole proprietorship of all its capital stock, the corporation was dissolved, and he became the equitable owner of all its property.

A corporation can be dissolved, and its existence wholly terminated, only by the extinguishment of the corporate franchises conferred by the State. An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of the stockholders may deem it advisable (*Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; *Black v. Delaware & C. Canal Co.*, 22 N. J. Eq., 416); but the franchises conferred upon the stockholders by the State are not extinguished by the cessation from business thus brought about. 2 Morawetz on Corp., § 1004.

. . . . .

It is claimed by the defendants that the dissolution of the corporation was effected by the fact that Lucius Frierson became the sole owner of all its capital stock. Admitting it to be true that he was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text writer on corporation law has this to say, viz.: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint stock company have passed into the hands of two members, or even into the hands of a single person, does not, *ipso facto*, work a dissolution of the corporation, since such sole owner may so dispose of the shares, as, by the election of the necessary directors and officers, to continue the corporate existence." 5 Thompson's Commentaries on the Law of Corporations, Sec. 6653. And, in 2 Morawetz on Corporations, Sec. 1009, it is said: "It is well settled that all the shares of a corporation may be held by a single person, and yet the corporation continue to exist, and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was, nevertheless, not dissolved, and that its existence could be terminated only by judgment of forfeiture or by surrender accepted by the State. *Russell v. McLellan*, 14 Pick. (Mass.), 69, 70; *Newton Mfg. Co. v. White*, 42 Ga., 148; *Baldwin v. Canfield*, 26 Minn., 43.

The dissolution of a pecuniary or business corporation is effected in one of the following ways, viz.: (1) by the expiration of its charter; (2) by Act of the Legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter which is accepted; (4) by forfeiture of the franchises and judgment of dissolution pronounced by a Court having jurisdiction. 2 Morawetz, Sec. 1004; Taylor on Private Corporations, Sec. 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the Legislature, or been surrendered to the State by its members or stockholders. It may be true that there was a nonuser of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly the nonuser of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the State; but until sentence of dissolution has been pronounced by a Court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose, by the State granting it. Code (M. & V.) § 1712; *State v. Butler*, 15 Lea, 104, 110; *Jersey*



*City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq., 427; *Broadwell v. Merritt*, 87 Mo. 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation or its title to its property can be questioned collaterally.

We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished for any of the reasons alleged by the defendants, and that it is now a corporation endued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frier-son in the property of the Bethel Hotel Company, did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendant with force and ability, and is supported by some authority. It has found favor with the Supreme Court of Maryland (*Swift v. Smith*, 65 Md., 428, 433); but the decision of that learned Court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental.

A corporation and its shareholders are distinct legal entities. In *Keith v. Clark*, 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, "the bank and the State are entirely different legal entities," and, in *Lillard v. Porter*, 2 Head, 175, it was said, "stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

"Shareholders," says Thompson, "are not joint tenants or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation." Commentaries on the Law of Corporations, Sec. 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed.

In *Wheelock v. Moulton*, 15 Vt. 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. In that case, Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repay-

ment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge Redfield said: "The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation, in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one, or of any number of the stockholders, will not affect the title to the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation."

And in *Humphreys v. McKissick*, 140 U. S. 304, Mr. Justice Field, discussing the same question, said: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers, subject to the conditions prescribed by law."

A very instructive case on this question is *Baldwin v. Canfield*, 26 Minn., 43. The facts of that case were very similar to those of this case, and the direct question now under consideration was passed upon. The opinion of the court was in accord with the cases above cited. See also *Button v. Hoffman*, 61 Wis., 20.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law. Thompson's Commentaries on the Law of Corporations, Sec. 5096. At common law a corporation could not execute a deed to realty except under seal; and the general corporations Act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly authorized officer.

To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one, and, if not, its name should have been signed by an agent duly authorized by its governing agency, its board of directors. *Garrett v. Belmont Land Co.*, 94 Tenn., 460. As we have seen, nothing of this kind was done. The deed to defendant, Webster, was executed by Lucius Frierson, in his own name and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it.

For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant, W. J. Webster, was void, and conveyed to him no title or interest therein.

We have assumed as a fact, in the preceding discussion, that Lucius Frierson was, in truth, the sole owner of all the shares of stock of the Bethel Hotel Company at the date he executed the deed to Webster. But was he?

[The Court then *held* that the pledgees of the stock acquired title thereto, even though they took with notice of a by-law of the company that no transfer should be effectual unless made on the books of the company.]

### BUNDY v. OPHIR IRON CO.

1882. 38 *Ohio State*, 300.<sup>1</sup>

THE Ophir Iron Company was a corporation consisting of ten stockholders, including the plaintiff, Bundy.

Bundy indorsed notes of the Company upon an agreement that he should be protected by a mortgage upon the Company's real estate.

The mortgage, instead of being executed in the name of the Company as grantor, was, by mistake, executed in the name of the other nine stockholders, thus:—

“Know all men by these presents, that Robert Hoop” [and eight others then named], “the grantors in this instrument, and who together with H. S. Bundy are the sole members and stockholders in the Ophir Iron Company, a corporation duly organized, . . . in consideration of ten thousand dollars paid by said H. S. Bundy to said Ophir Iron Company, . . . do hereby grant . . . to the said H. S. Bundy, . . . all the right, title, interest and estate, legal and equitable, of the afore-said grantors in and to the following lands and tenements of the said Ophir Iron Company, . . .”

[Then follows the condition that the deed shall be void if the Company shall pay the notes indorsed by Bundy, and shall save Bundy harmless.]

This mortgage deed is signed with the individual names and sealed with the individual seals of the nine persons named as grantors, by whom, as grantors, it is also acknowledged as their voluntary act and deed. It was recorded Dec. 5, 1874.

On April 17, 1875, a second mortgage, on the same premises, was duly executed by the corporation, through its president, to secure all its creditors except Bundy. The latter mortgage recites that it is made “subject, however, to a mortgage in favor of Hezekiah S. Bundy, for the sum of \$10,000, of record in said County,” &c.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

In May, 1875, various creditors of the corporation (who were also mortgagees in the second mortgage) obtained judgments against it, which took effect as liens upon the lands described in the mortgages.

In August, 1875, Bundy, having paid the notes which he had indorsed, commenced an action to foreclose his mortgage, making various creditors of the corporation parties. The District Court found that the mortgage of Bundy was invalid as against the subsequent creditors of the Company.

Bundy brought error.

W. W. Johnson, with whom were John T. Moore, Porter Du Hadway, and J. B. Foraker, for plaintiff in error.

Wilby & Wald, and C. A. Atkinson, for certain creditors.

WHITE, J. The controversy in this case is between Bundy, claiming as first mortgagee, subsequent judgment creditors, and creditors claiming under the second mortgage.

Two questions arise for consideration: (1) Whether the execution and record of the mortgage of December 5, 1874, to Bundy, give him priority? and, (2) If not, does the recognition of the first mortgage in the second, of April 17, 1875, have that effect?

As to the first question: The consideration upon which Bundy indorsed the notes as surety of the corporation, was that the latter should give him a mortgage upon its property, conditioned that it would pay the notes at maturity, and save him harmless on account of his indorsements. The execution by the stockholders of the first mortgage was the attempted fulfilment of the agreement on the part of the corporation.

The Ophir Iron Company was incorporated under the act of April 12, 1858, providing for the creation and regulation of manufacturing companies. S. & C. 301, 304. Under that act the directors of the company are required to be stockholders; and while it is declared "the directors shall have the general management of the affairs of the company," yet they are made "subject always to the control of the stockholders" in reference to such management.

The mortgage to Bundy now in question, not being made in the name of the corporation, cannot, as against it, be regarded as a legal mortgage; but it is a good, equitable mortgage against the corporation. And if such direction were necessary, it might be considered as equivalent to a direction by the stockholders to the proper officers to make a mortgage in the name of the corporation to Bundy. But such direction was not necessary from the stockholders. The directors, under the agreement by which they obtained Bundy's indorsements of the notes of the corporation, were bound to secure him by the mortgage of the corporation. This they failed to do, by sheer mistake, in the form of executing the mortgage, which it was competent for a court of equity to correct; and which it was their duty to correct without the action of the court. *Clayton v. Freet*, 10 Ohio St. 544.

If it were not for our statute on the subject of mortgages, this equi-

table mortgage would prevail over all lien-holders and other claimants, except *bona fide* purchasers, for value. But it has been held, in a long series of decisions, that a mortgage has no effect, under the statute, either in law or equity, as against subsequently acquired liens, until its execution according to the statute, and its delivery to the recorder of the proper county for record. *Strang v. Beach*, 11 Ohio St. 283; *Bercau v. Cockerill*, 20 *Id.* 163.

But such execution and delivery for record are not required as between the original parties or their heirs. *Bloom v. Noggle*, 4 Ohio St. 45; *Sidle v. Maxwell*, *Id.* 236.

The second question is: Does the recognition of the first mortgage in the second have the effect to give it priority?

We think this question must be answered in the affirmative. The second mortgage was executed in due form by the corporation, and was made expressly subject to the mortgage to Bundy. Hence, all subsequently acquired liens that are subject to the second mortgage are necessarily also subject to the first. *Coe v. Railroad Co.*, 10 Ohio St. 374; *Bercau v. Cockerill*, 20 *Id.* 166.

It is, however, claimed on behalf of some of the judgment creditors that the second mortgage was not accepted by the mortgagees.

[After overruling this objection, the opinion proceeds as follows]:

Whether Bundy does not stand in such relation to the second mortgage, as to entitle him to insist upon it, both as against the corporation and the subsequent judgment creditors, without reference to its acceptance, may admit of question. But it is a question that need not now be considered. Upon the case as made in the record, the court erred in denying to Bundy the priority to which he was entitled. The judgment must therefore be reversed; and the cause is remanded for further proceedings.

*Judgment accordingly.*

# BUTTON v. HOFFMAN. .

1884. 61 *Wisconsin*, 20.

APPEAL from the Circuit Court for Jackson County.

Replevin. The facts sufficiently appear from the opinion. The defendant appealed from a judgment in favor of the plaintiff.

*C. J. Ainsworth* and *S. U. Pinney*, for appellant.

*Carl C. Pope*, for respondent.

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property

belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. Ang. & A. Corp. §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Ang. & A. Corp. § 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui que trusts*. *Gray v. Portland Bank*, 3 Mass. 365; *Eidman v. Bowman*, 58 Ills. 444; s. c. 11 Am. Rep. 90; 4 Am. Corp. Cas. 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp. § 191; *Pope v. Brandon*, 2 Stew. (Ala.) 401; *Whitwell v. Warner*, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. *Bradley v. Holdsworth*, 3 M. & W. 422; *Waltham Bank v. Waltham*, 10 Met. 334; *Tippets v. Walker*, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot

divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp. §§ 160, 190, 557; *Hyatt v. Allen*, 56 N. Y. 553; s. c. 15 Am. Rep. 449; 4 Am. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. *Wilde v. Jenkins*, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp. § 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint-owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate the business and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could of course do what several stockholders could lawfully do. It is said in *Utica v. Churchill*, 33 N. Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in *Hyatt v. Allen*, *supra*, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona, &c. R. Co. v. St. P., &c. R. Co.*, 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property and immunities. In *Baldwin v. Canfield*, 26 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett*, 14 Allen, 62, an action of replevin was brought by A., B. and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B. and C., trustees as aforesaid," became bound, and the officer in his return, certified that he had taken a bond "from the within-named A., B. and C.," and the property was receipted by "A., B. and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judg-

ment was rendered for the defendant. It is said in *Van Allen v. Assessors*, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde v. Jenkins*, *supra*, where a copartnership bought all the property and effects, together with the franchises of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. R. C. Bank*, 11 Paige, 118, it was held that although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. Am. Art Union*, 5 Sandf. 614, it was held that "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant as a shareholder in the Art Union, for an injunction against a certain disposition of its property was denied, because he had no interest in it. See also *Goodwin v. Hardy*, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp v. Dockham*, 32 Wis. 146; *Sensenbrenner v. Mathews*, 48 Wis. 250; s. c. 33 Am. Rep. 809. In analogy to the above principle it was held in *Murphy v. Hanrahan*, 50 Wis. 485, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

*Reversed and remanded.*



## GALLAGHER v. GERMANIA BREWING CO.

1893. 53 *Minnesota*, 214.<sup>1</sup>*Freeman P. Lane*, and *Wm. H. Briggs*, for appellant.*Gretchen & McHugh*, for respondents.

MITCHELL, J. The plaintiff, as assignee of one Westphal, under a general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Barge & Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned (each one half), all the capital stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. From an order overruling a demurrer to the complaint, the plaintiff appeals, his contention being, First, that Barge & Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders. These two propositions amount really to the same thing, for, if Barge & Vander Horck cannot set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would entitle them to intervene; on the other hand, if their claims are proper, equitable set-offs, their right to intervene for the purpose of setting them up is very clear. The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted. The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at

<sup>1</sup> Statement and arguments omitted. — Ed.

the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice; and it may be stated as a general rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record, and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit of the cestui que trust. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable ground for allowing such a set-off. But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall. Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respondent quite plausible. But, suppose there were fifty other stockholders (which would not alter the principle), what

would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exists, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can set up demands against the individual stockholders as set-offs to demands in favor of the corporation. Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders. What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation.

*Order reversed.*

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### WARING v. CATAWBA CO.

1797. 2 Bay, South Carolina, 109.<sup>1</sup>

ASSUMPSIT for goods sold, and for work and labour, &c.

Plea in abatement.

This case came before the court upon a plea in abatement, which pleaded that plaintiff was himself a member of the company, and therefore could not maintain any action against it in his individual capacity.

*Trezevant*, for plaintiff.

*Attorney-General*, contra.

THE COURT, after hearing the arguments, overruled the plea in abatement, as containing principles subversive of justice; but they observed, that the two cases of *Bourdeaux* and *Drayton* against the *Santee Canal Company*, had settled this point, as they had both been allowed by this court to maintain their actions for their salaries, &c., against the company, as well as the cases respecting the other public societies, mentioned in the argument.

The plaintiff was then allowed to go on and prove his debt to a jury.

Present, BURKE, GRIMKE, and BAY; but as Judge GRIMKE was a member of the company, he declined giving an opinion.

<sup>1</sup> Arguments omitted. — ED.

## JOHN FOSTER &amp; SON LIMITED v. COMMISSIONERS OF INLAND REVENUE.

1893. L. R. (1894) 1 Q. B. 516.<sup>1</sup>

CASE stated by Commissioners of Inland Revenue.

The Stamp Act imposes an *ad valorem* duty "upon conveyance or transfer on sale of any property." The consideration, as appears from another clause of the Act, need not always be money, but may be stock or marketable securities. The Act provides that the term "conveyance on sale" includes every instrument "whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Eight persons, who had for many years carried on business in partnership as John Foster & Son, being desirous that the firm should be reconstructed as a Limited Company (registered with limited liability under the Companies Acts), agreed to terminate their partnership, and to transfer all the firm property to a Limited Company, styled John Foster & Son Limited, to be formed of all the partners exclusively for the purpose of taking over the same subject to all the liabilities; the whole of the ordinary shares, preference shares, and debenture stock of the company to be allotted among the partners in proportion to their respective shares in the partnership estate. In accordance with this agreement, by deed of indenture between the eight persons who composed the partnership and the Limited Company, registered under the Companies Acts under the name of John Foster & Son Limited, all the partnership property was conveyed to the Limited Company.

The Commissioners assessed an *ad valorem* duty upon the deed, as coming under the head of a "conveyance or transfer on sale."

In the Queen's Bench Division, CAVE, J. held that the assessment was erroneous, and WRIGHT, J. took the opposite view. WRIGHT, J., withdrew his judgment, and the appeal from the Commissioners was allowed.

From this decision of the Divisional Court, the defendants appealed to the Court of Appeal.

*Sir Charles Russell*, A. G., and *Danckwerts* (*Sir John Rigby*, S. G., with them), for appellants.

*Finlay*, Q. C., and *A. R. Kirby*, for respondents. [Argument as condensed in 69 L. T. N. s. p. 817.]

In order to constitute a sale there must be two different parties capable of making an agreement, and there must be two different things, the property sold and the price given for it. In the present case there has merely been a re-arrangement of ownership. The parties remained the same, and nothing was parted with, and nothing was given. It

<sup>1</sup> Statement abridged. Opinions in Queen's Bench Division, and part of arguments, omitted. — ED.

was like a conveyance of property to trustees upon trust to carry on the business, and divide the proceeds arising from it amongst the conveying persons.

LINDLEY, L. J. I confess that, with great deference to CAVE, J., I cannot see the difficulty in this case.

The material sections of the Act of 1870 must first be considered. [The Lord Justice then read ss. 70 and 71 of the Stamp Act, 1870, and continued]: The importance of s. 71, to my mind, is this: it shews that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable securities" will be found in s. 2. Then s. 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shews what the stamps are that are imposed upon conveyances that are charged. First we have "conveyance or transfer whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head. Then we have "conveyance or transfer on sale, of any property" . . . "where the amount or value of the consideration for the sale does not exceed £5." That fits in with ss. 70 and 71. Then we come to "Conveyance or transfer by way of security of any property or of any security;" and then we have "Conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first, nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts, and "John Foster & Sons Limited (hereinafter called 'the company'), of the 9th part." Pausing there for a moment: although the persons of the first eight parts may be, and were members, and the only members, of John Foster & Co. Limited, John Foster & Co. Limited is not those eight individuals; John Foster & Co. Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. [The Lord Justice then stated the recitals in and the operative part of the conveyances, and continued]:—

Then the parties of the first eight parts put their seals to the instrument, and the company puts its seal to it. Now, what is that instrument? It is certainly a conveyance of property; that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s. 71 of the Act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another, for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half-a-dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying, there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that CAVE, J., has attached too little importance to the fact that you have here a distinct seller, and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation which consists of the eight persons who formed, and who are, the partners. The appeal must be allowed.

KAY, L. J. I am of the same opinion. With deference to CAVE, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely

independent and separate body, — namely, a corporation. Suppose that corporation had consisted of altogether different persons, no one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this, — that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveyed other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end. In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns. You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which observe are immediately transferable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument, of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate, that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, “a conveyance on sale” for a consideration, which, if not money, at least is money’s worth. I, therefore, with all deference to CAVE, J., think that his decision must be reversed, and the appeal allowed.

A. L. SMITH, L. J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head — “conveyance or transfer” — in the schedule to the Stamp Act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to ss. 70 and 71 of the Act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say, Yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not appear to me to be disputed so far, in the judgment of my brother CAVE; but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons — that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother CAVE. It seems to me that the company limited are not the same persons as the eight members of the old firm — they are different altogether. It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother CAVE's feet when he said so, that the company limited could maintain a suit for specific performance against the old partners. If that is so, how can they be the same persons? This really shews that they are not the same persons. It is here that I disagree with my brother CAVE.

The respondents also contend that there was no consideration. We must read the two sections together. Sect. 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then s. 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which, undoubtedly, are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of s. 71 itself, — "any stock or marketable security."

For these reasons, I prefer the judgment of my brother WRIGHT to that of my brother CAVE.

*Appeal allowed.*



MOORE & HANDLEY HARDWARE CO. v. TOWERS  
HARDWARE CO.

1888. 87 *Alabama*, 206.<sup>1</sup>

APPEAL from the Chancery Court of Jefferson.

Bill filed Dec. 3, 1888, by Towers Hardware Co., a private corporation, against Moore & Handley Hardware Co., another private corporation, seeking to enjoin defendant company from selling "plow-stocks and plow-blades" in violation of a contract made between plaintiff company and a partnership doing business under the name of Moore, Moore & Handley, which was composed of James D. Moore, Benj. F. Moore, and William A. Handley, who, as the bill alleged, afterwards formed the defendant corporation. The allegations of the bill were, in substance, as follows: Said partnership, May 27, 1887, sold out to plaintiff their entire stock of plow-stocks and plow-blades; signing an agreement — "we agree not to handle any more plow-stocks or plow-blades, except railroad plows." On March 12, 1888, the defendant company was incorporated under the general statutes. The said partners each subscribed one-fourth of the capital stock, and one Wimberly one-fourth. If Wimberly ever had any interest in the corporation, he had not had it since Aug. 8, 1888. Said Moores and Handley are now the sole owners. The defendant corporation was organized for the purpose of carrying on the same business which the partnership had carried on. Its capital stock was paid for wholly in the assets of said partnership. It succeeded to all the property rights and assets of said partnership, as well as all the liabilities thereof. Said defendant corporation is none other than said J. D. Moore, B. F. Moore, and Wm. A. Handley, who constituted said partnership, and now constitute said corporation. "Your orator cannot say whether or not said Moores and Handley organized said corporation for the purpose of evading the force and effect of their said agreement with your orator, but does say and charge that the effect of their doing so would be to perpetrate a fraud on your orator, if they should be allowed to handle plow-blades and plow-stocks; that the defendant's business, as now conducted, is identically the same as that conducted by said Moores and Handley, is conducted by the same persons, and in substantially the same manner as before, and that the only change in fact has been in the name of the concern.

The defendant corporation answered the bill; denying that it assumed, or became liable for, the obligations of said partnership, or of its individual partners, or that it acquired any interest in the outstanding notes and accounts due to said partnership, or the real estate owned by the partners, which was more than sufficient to pay all their out-

<sup>1</sup> Statement abridged. Arguments, and part of opinion, omitted. — Ed.

standing debts and liabilities; alleging that Wimberly owned a one-fourth interest in the corporation at its organization, and for some time acted as its treasurer, but admitting that the Moores and Handley had since bought out his interest; and demurring to the bill for want of equity.

After answer filed, defendant moved to dissolve the temporary injunction and to dismiss the bill; and this appeal is taken from the decree of the Chancellor refusing these motions.

*Smith & Lowe*, for appellant.

*Cabaniss & Weakley*, contra.

MCCLELLAN, J. The equity of the bill, so far as the injunction is concerned, and the sufficiency of those of its allegations which are not denied by the answer to sustain the injunction depend, primarily, on two questions. *First*, whether the contract relied on is void, as being in unreasonable restraint of trade; and, *second*, whether a negative undertaking entered into by persons who subsequently organize, and for the time constitute a corporation for the prosecution of the business with respect to which the contract was made, can be enforced by injunction against the corporation.

1. [The learned Judge held that the contract was not void, as being in unreasonable restraint of trade.]

2. The general doctrine is well established, and obtains both at law and in equity, that a corporation is a distinct entity, to be considered separate and apart from the individuals who compose it, and is not to be affected by the personal rights and obligations and transactions of its stockholders, and this whether said rights accrued or obligations were incurred before or subsequent to incorporation. 1 Mor. Priv. Corp. §§ 227-234, 547-549; *Morrison v. Mining Co.*, 52 Cal. 309; *Hawkins v. Mining Co.*, *Id.* 515; *Gent v. Insurance Co.*, 107 Ill. 658; *Railroad Co. v. Helensburgh*, 2 Macq. 391; *Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. Rep. 22. There is a class of contracts, however, which are entered into between the promoters or projectors of a contemplated corporation and third persons on the faith of the corporation, intended to inure to its benefit, and which in point of fact do inure to its benefit, on which the corporation will be charged, even in the absence of an express promise to perform, or ratification on the part of the company after it is *in esse*, on "the familiar principle that one who adopts the benefit of a contract which another volunteers to perform in his name and on his behalf is bound to take the burden with the benefit." 1 Redf. R. R. (5th ed.) 18; *Edwards v. Railroad Co.*, 1 Mylne & C. 650; *Stanley v. Railway Co.*, 9 Sim. 264; *Little Rock & F. S. R. Co. v. Perry*, 37 Ark. 164; *Perry v. Little Rock & F. S. R. Co.*, 44 Ark. 383; *Bommer v. Manufacturing Co.*, 81 N. Y. 468. And in those cases where associates combine together to create a paper corporation to cover a partnership or joint venture, and where the stockholders are partners in intention, and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had

attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation and participated in the effort to avoid it. *Wheel Co. v. Wagon Co.*, 20 Fed. Rep. 700; *Beal v. Chase*, 31 Mich. 490, 495, 532.

The contract of Moore, Moore & Handley, sought to be enforced against the Moore & Handley Hardware Company, was not an undertaking between promoters of the company and third parties, nor made on the faith of the corporation, nor intended to inure to its benefit, nor did it inure, in point of fact, to the benefit of the corporation. It is not of that class of contracts which courts enforce against corporations on the grounds that they were made in the corporate name by anticipation, and that the corporation received and accepted the benefits resulting from them. There is no allegation of fraud made against the corporation or its shareholders, and the implication of the fraudulent effect of the corporate action complained of is denied. It is not shown that this is a mere "paper corporation" to cover a joint venture in which the corporators are partners in intention, and have resorted to this form for the purpose of evading and avoiding obligations which they had taken upon themselves as individuals, or for the purpose of evading the promise relied on here. If these things had appeared in the case we should not hesitate to hold the corporation answerable for the individual obligation. But in the absence of fraud "no authorities have gone the length of holding that any contract made with individuals exclusively upon individual credit will become the contract of any future corporation that may form for the more convenient management and use of the benefits of it." *Little Rock & F. S. R. Co. Cases, supra*. If the case of *Beal v. Chase, supra*, goes beyond this doctrine, we cannot indorse it. We do not think it does. In that case the corporation had been formed for the purpose of violating a contract not to engage in a certain business. All the corporators were held to have participated in this purpose. The business was to be conducted by the corporation in connection with the promisor in his individual capacity. He had an interest in it, both individually and as the principal shareholder of the company; and the court enjoined the corporation, not generally, but from carrying on the business with or for the individual contracting party. To put the case at bar in line with that case it would have to appear, not only that the corporation organized for the purpose and with the intention of evading their contract through the separate entity of corporate existence, but also that they reserved an interest in the business distinct from their interests as stockholders. None of these facts are shown. The effect of allowing the injunction in this case to continue would necessarily be to hold all future shareholders in the cor-

poration to the performance of a contract which neither they nor the corporation had ever entered into, and of which they may not even have had notice. Such a result could only be justified on the ground of bad faith in the creation of the company. To thus hamper a *bona fide* corporation would be inequitable, and have the effect of establishing a doctrine fraught with much danger to corporate rights, powers, and property.

The allegations going to show a ratification by the corporation of this contract of Moore, Moore & Handley are denied by the answer, and hence cannot be considered in passing on the decree overruling the motion to dissolve the injunction. Those allegations of the bill which are not denied were not sufficient to authorize a continuance of the injunction, and the decree on that point was erroneous, and is reversed. The contract relied on here is such a one as the respondent corporation could have made under its charter. It is therefore one which, being already in existence between complainant and the individuals composing the defendant company, the corporation had the power to ratify and adopt. The bill, in our judgment, sufficiently avers such ratification or adoption. These allegations give equity to the bill, and the decree overruling the demurrer is affirmed. The cause will be remanded, with instructions to the chancellor to dissolve the injunction, unless the complainant amends its bill so as to entitle it to a continuance of the writ, under the principles we have announced.

*Reversed and remanded.*

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## WARREN v. DAVENPORT FIRE INSURANCE CO.

1871. 31 Iowa, 464.<sup>1</sup>

ACTION on a policy of insurance, issued by defendant on alleged property of Goodale & Hosford, payable, in case of loss, to plaintiffs, who are creditors of G. & H.

Petition averred that defendant insured Goodale & Hosford against loss by fire, to the amount of \$2,500, "on their private stock contained in a one story frame saw-mill, machinery, fixed and movable, engine and boilers therein, and known as that of the Dubuque Lumber Company" — loss, if any, payable to the plaintiffs. Petition also averred that Dubuque Lumber Co. was and still is a corporation; that by the "private stock" before mentioned was meant the capital stock which G. & H. then had and still have in the corporation, all of which was known to defendant's agent at time of insurance; that by means of such stock said G. & H. had, and continued to have, an interest in

<sup>1</sup> Statement abridged. — Ed.

the insured property, viz. in said saw-mill, machinery, &c., to an amount exceeding \$2,500 over and above so much of their interest therein as was covered by an insurance of \$15,000, effected by the corporation in its corporate name; that plaintiffs are creditors of G. & H. to a large amount, and hold the certificates for a considerable amount of the stock of said corporation as security; and that the insurance was effected with the full knowledge and consent of the lumber company.

Attached to the petition was a copy of the policy, stipulating that "the loss or damage is to be estimated according to the true and actual cash value of the property at the time the same shall happen and be paid."

To this petition defendant demurred: *first*, because it does not show that plaintiffs have any interest in the property destroyed or in the policy; *second*, because it does not show that Goodale & Hosford had any insurable interest in the property insured at the time the insurance was effected by them.

The demurrer was sustained in the District Court. Plaintiffs appealed.

*Cotton & Cross*, for appellants.

*W. E. Leffingwell*, for appellee.

MILLER, J. The question raised by the demurrer is, whether the parties effecting the insurance in this case had an *insurable interest* in the property insured at the time the risk was taken and at the time of loss by fire.

Policies of insurance founded upon *mere* hope and expectation, and *without some interest*, are said to be objectionable as a species of *gaming*, and so have been called *wager* policies. These policies were expressly prohibited in England by statute of George II., ch. 37, and they have been adjudged illegal and void in this country upon the principles of that statute. Angell on Fire & Life Ins., §§ 18, 55. It is not that wager policies are without consideration or unequal between the parties that they are held void, but because they are contrary to public policy. Policies of fire insurance, without interest, are peculiarly and extremely hazardous by reason of the temptation they hold out to the commission of arson by the party assured, which is necessarily attended with peril of the most deplorable kind to a whole neighborhood. In *King v. State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 10, Mr. Chief Justice Shaw says: "If an insurance were made on a subject in which the assured has no pecuniary interest — although in other respects he may be *deeply concerned* in it and on *that* ground be willing to pay a fair premium — made with full knowledge of all the circumstances, by both parties, without coercion or fraud, we cannot perceive why it would not be valid as between the parties. But upon the strong objections, on grounds of public policy, to all gaming contracts, and especially to contracts which would create a temptation to destroy life or property, such policies without interest are justly held

void." Upon the ground of public policy, therefore, if the assured have no interest in the thing insured, the policy must be held void. This is well settled. On the other hand it is equally well settled that not only the *absolute* owner, but any one having a *qualified* interest in the property insured, or even any reasonable expectation of profit or advantage to be derived from it, may be the subject of insurance and especially if it be founded in some legal or equitable title. Id. § 56. And the general doctrine that any interest, in the subject-matter insured is sufficient to sustain an insurance upon real property is one which has been fully sustained. Id. § 57, and notes. Several persons owning different interests in the same property may insure their several interests. And it is not material whether the interest assured be legal or equitable. Any interest which would be recognized by a court of law or equity is an insurable interest.

The interest of a *cestui que trust*, mortgagor, mortgagee, of a lender or borrower on bottomry, so far as regards the surplus value, or of a captor, or of one entitled to freight or commission, is insurable. So where a lessor on ground rent has entered for the arrears, under a covenant that he may hold until the arrears are paid, &c., has an insurable interest. So also in case of one in possession of land by disseisin. Angell on Fire and Life Ins., §§ 57, 58, 59; 2 Parsons on Cont., § 2 of ch. 14, commencing on p. 438, and cases cited; 2 Greenlf. on Ev., § 379.

The term *interest*, as used in application to the right to insure, does not necessarily imply *property* (*Hancock v. Fishing Insurance Co.*, 3 Sumner's C. C. 132; Angell on Life and Fire Ins., § 56), and as the contract of insurance is one of indemnity, against losses and disadvantages, an *insurable interest* may be proved in the assured, without the evidence of any legal or equitable *title* in the property. *Putnam v. Mercantile Insurance Co.*, 5 Metc. 386; *Lazarus v. The Commonwealth Insurance Co.*, 19 Pick. 81, 98. An "insurable interest" is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Yet such a connection must be established between the subject-matter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of the injury to it. *Buck v. Chesapeake Insurance Co.*, 1 Pet. 163.

In the case under consideration the assured were stockholders in the Dubuque Lumber Co., a corporation for pecuniary profit. The property destroyed belonged to the corporation. The insurance was upon the interest which the assured had in that property by virtue of the capital stock therein owned by them.

The object of the insurance was to indemnify the assured against loss to them in the event of a destruction of the property by fire. Could or would they sustain loss in such event? How would their interest be affected? It seems to us to be beyond controversy, that, in

case of the destruction of the corporate property by fire, the stockholders sustain loss to a greater or less extent, dependent on the particular circumstances. Suppose the case of a grain elevator upon some of our numerous railroad lines, built, owned and managed by a joint-stock corporation; that this is the only property of the corporation; that the entire capital stock is represented in and by this property; that, in consequence of the profitable nature of the business, large dividends are realized by the stockholders, and the stock is above par in the market. The destruction of this property by fire would at once result in the loss of dividends to the stockholders and a destruction of the value of the stock, or at least to its reduction to a nominal value. The entire property, representing the whole capital of the corporation, being destroyed, it is difficult to perceive what would give any value to the stock. It is true that, primarily, the loss is that of the corporation, and hence it may insure, but the corporation may refuse to insure, and then the *real* and actual loss falls on the stockholders.

The appellee argues that shares of stock in a corporation are choses in action, and are not considered to be an interest in the real property of the company, and cites numerous authorities to sustain this position. This may be admitted without denying the shareholders' "insurable interest" in the property of the corporation. A mortgage, also, is but a chose in action. The mortgagee acquires no right to the mortgaged property which can be attached, levied on under a general execution, or that can be inherited. It is a mere security for a debt. *Eaton v. Whiting*, 3 Pick. 484; *Smith v. People's Bank*, 11 Shep. (Me.) 185; *Abbott v. Mutual Fire Ins. Co.*, 17 id. 414; *Middleton Savings Bank v. Dubuque*, 15 Iowa, 394; *Newman v. De Lorimer*, 19 id. 244; *Baldwin v. Thompson*, 15 id. 504; *Burton v. Hintrager*, 18 id. 348; *Hilliard on Mort.* 215.

And yet the cases are uniform to the effect that a mortgagee of real property has an insurable interest therein which he may insure on his own account, but that when he does so it is but an insurance of his debt. *Eaton v. Whiting*, *supra*. And in case of damage by fire to the premises before payment of the mortgage, his loss, if any, is that his security has been impaired or lost. His interest is but a chose in action in the nature of a security, which he may insure, so that in case of destruction of or damage to the property upon which his security rests, he will be indemnified for the loss he actually sustains. So, also, it seems to us that the owner of stock in a corporation for pecuniary profit has a like interest in the corporate property. A mortgagee of real property has an insurable interest in the mortgaged premises, based upon the interest he has in the preservation of the same as security for a debt. He has a legal right to contract for indemnity against injury to the value of his security.

Upon precisely the same principle a stockholder may contract for indemnity against injury to the value of his stock, for he also has an

interest in the preservation of the corporate property from destruction by fire; and in its destruction he sustains loss in so far as the value of his stock is depreciated in consequence thereof, or his dividends cut off.

The argument that, if this is allowed, owners of stock worth not more than ten per cent upon its nominal value may be insured at its par value, and in case of loss by fire such par value of the stock recovered from the insurer seems to us to be unsound. Without entering into a discussion in detail of what would be the exact measure of recovery in such case, we simply answer that no more than the *actual loss sustained* is in any case recoverable. This rule is well established, and rests upon just principles. See Angell on Fire and Life Ins., ch. 11, and cases cited in notes.

The question under consideration has not received direct judicial determination in any of the States, so far as we have been able to discover. The case of *Phillips v. Knox County Ins. Co.*, 20 Ohio, 174, is cited and claimed as an authority against the right of a stockholder to insure. The decision in that case, as a careful examination of the same fully shows, was made entirely upon a construction of the charter of the insurance company, which gave a *lien* on the insured property, including the land on which the buildings stand. By the charter a sale of the insured property rendered the policy void, and the ninth section declared, that if the insured have a less estate than an unincumbered title in fee simple to the buildings insured and the lands covered by the same, the policy shall be void, unless the true title of the insured and the incumbrances be expressed in the policy and the application therefor. The plaintiff insured *as owner* of the property, which in fact belonged to a corporation of which he was a stockholder, and the court held that, "where a building and the land on which it stands is the property of an incorporated company, the stockholders could not, under the provisions of the defendant's charter, insure such property as their individual property in the defendant's company."

Under the charter of that company, a mortgagee even, insuring the property *as his own*, would likewise be defeated in a recovery. So the owner in fee simple could not recover if the property was incumbered and the incumbrance not set forth in the policy. And of course the same result must follow where a stockholder insures corporate property as his own individual property. The decision in that case goes no further than this, and is no authority in support of the proposition, that a stockholder has no insurable interest in the property of the company, and, hence, has no bearing upon the question before us.

The judgment of the district court is

*Reversed.*



## FAIRFIELD COUNTY TURNPIKE CO. v. THORP.

1839. 13 Conn. 173.<sup>1</sup>

ASSUMPSIT on stock subscription. Defendant offered to prove an admission made by one Hickok, a stockholder in the plaintiff corporation. The evidence was excluded. Verdict for plaintiff. Motion for a new trial.

*Dutton*, for defendant.

*Bissell and Booth*, for plaintiff.

WILLIAMS, C. J. . . . It is claimed, that *Hickok* being a stockholder in the company, his declarations are admissible as the confessions of a party. That the confessions of the party on the record may be given in evidence, is certainly true. Testimony of this kind proceeds upon the ground that it is not to be presumed that persons will admit anything against their interests. There are cases, however, where the party on the record has really no interest, or at most a mere nominal interest; as where a person has assigned a note without recourse; where a partnership is dissolved, and one is to discharge the debts, &c.; in which cases, this evidence is admitted, but with reluctance. In New-York it has been held, that the admissions of partners after a dissolution, cannot be given in evidence against a co-partner, except to prevent the operation of the statute of limitations. *Hopkins v. Bank*, 7 Cow. 650, 653; *Gleason & al. v. Clark*, admr. 9 Cow. 57; *Hackley v. Patrick & al.* 3 Johns. Rep. 536. We have adhered to the English rule in admitting the evidence, although in certain cases holding that it was entitled to no weight. *Coit v. Tracy*, 9 Conn. Rep. 1, 8 Conn. Rep. 268, 277. It becomes important to inquire, in this case, whether *Hickok* is a party upon the record. If he is, then any single shareholder in a bank of any amount of capital is a party to any suit brought by the bank, and his declarations are admissible. Whatever may be said as to the shareholders in corporations being parties in fact or parties in interest, it is certain they are not parties upon the record. The record speaks only of the artificial, intangible, being created by the act of incorporation. In corporations of this character, it speaks of and knows no individual. There are cases, however, in which courts have drawn aside the veil and looked at the character of the individual corporators; particularly when the question arises as to the jurisdiction of the court. This has been done by the supreme court of the United States the better to carry into effect the spirit of the constitution, giving the courts of the United States jurisdiction in suits between inhabitants. *Bank of the United States v. Deveaux*, 5 Cranch, 91, 2. But this is confined to the question of jurisdiction, and has never been

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to one point. — Ed.

extended further. *Bank of Augusta v. Earle*, 13 Pet. 586. So, too, this court has holden, that a judge shall not sit who is within the prohibited degrees of relationship to a member of a corporation; and this to carry into effect the spirit of the act and to prevent any suspicion of partiality. These cases, however, rather form exceptions to the rule than create a new one. We see nothing in the case before us which ought to induce the court to extend the rule of law beyond its letter. On the other hand, there are strong objections to this evidence. The first results from the nature of the evidence itself. For although the declarations of the party in interest against his interest, if fairly represented, are strong evidence against him; yet there is so much suspicion often attached to it from the misapprehension of the hearer and the treachery of memory in the reporter, to say nothing of the danger arising from a prejudiced mind, that it is often to be received with many grains of allowance. In cases of this kind the interest is frequently so minute as to create no presumption, or a very slight one, that the person would not make such a declaration because against his interest. On the contrary, many circumstances too minute for explanation, might lead to a bias much stronger than such pecuniary interest. Every day's experience will shew us that the prejudices and alienations which arise in the intercourse of business, entirely overpower the slight interest of small shareholders; and although this would be no reason for excluding evidence clearly admissible, yet it may be proper, in considering whether evidence excluded by the letter of the rule is within its spirit. Besides, the knowledge of individual stockholders is generally so limited as to make it of no importance.

It is said, however, that all these are proper considerations for the jury to weigh. But when we consider the surprise upon the real party from testimony of this kind from unexpected quarters, which must frequently happen, and the embarrassments occasioned thereby, the multitude of collateral inquiries which might often arise in investigating the real connexion of the persons whose admissions are offered in evidence, and the delay attending such inquiries, it seems to us that such evidence would more often mislead than guide to truth. It seems to be supposed, that because the individual stockholder cannot be compelled to testify, his declarations therefore are admissible; but it does not follow that the declarations of any person who cannot be compelled to testify on account of his interest are admissible as evidence. Take the case of bail, of a feme covert, of a person who, by his answer, might subject himself to a penalty or a debt; their declarations are not admissible as a matter of course. In such cases, perhaps a court of chancery, upon proper application, might compel a disclosure. Then there would be no surprise; and such terms might be imposed as would render it safe. We know that in England it has been decided by the court of *King's Bench*, that the admissions of a rated parishioner may be evidence in a suit by the inhabitants of the parish. It seems to have been thus first decided upon the ground that it was in fact a suit

against the inhabitants themselves. *The King v. Inhabitants of Hurdwick*, 11 East, 578, 586. There the suit is, in name as well as in fact, against the inhabitants; and the property of the individuals is liable to be taken in execution. *McLoud v. Selby*, 10 Conn. Rep. 395. And in a case but two years before, Lord *Ellenborough* held, that in an action by a corporation, what any individual said [referring to individual corporators] could not be given in evidence, although he did not extend the rule to the declarations of a public officer of the corporation. *The Mayor of London v. Long*, 1 Campb. 22. Before either of these cases, our superior court had decided that the declarations of an individual member of a corporation, even although he was an officer in it, could not be given in evidence. *Hartford Bank v. Hart*, 3 Day, 494. That decision has ever since been acquiesced in; and it is by the supreme court of New York favourably contrasted with the English decisions. *Osgood v. Manhattan Bank*, 3 Cowen, 623. And upon a careful review, we are not disposed to question the propriety of what has long been considered our settled practice. In the state of Maine, too, a similar decision has been made. *Polleys v. Ocean Insurance Company*, 2 Shep. 141.

New trial not to be granted.

## WASHINGTON INSURANCE CO. v. PRICE.

1823. 1 *Hopkins, N. Y. Chancery Reports*, 1.

[BEFORE SANFORD, Chancellor.]

This cause being noticed for hearing, the chancellor informed the counsel of the parties that he was a stockholder in the Washington Insurance Company, and that according to the opinion which he then entertained, he could not hear the cause: but he expressed a desire that the question, whether he ought to act as judge in the cause or not, should be argued. The counsel declined to argue the question, and the chancellor this day gave his opinion.

The sole judge of this court, being a stockholder in the incorporated company which institutes this suit, can he proceed or act as judge in the cause?

It is a maxim of every code, in every country, that no man should be judge in his own cause. . . .

But it has been said, that where a court consisting of a single judge, has exclusive jurisdiction of the subject of a suit, a failure of justice would take place if the judge should not act in his own cause.

A failure of justice may take place if he should not act; as it also may occur if he should decide his own cause: but it belongs to the power

which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights or his own wrongs.

By the third section of the act concerning the court of chancery, it is provided, "That where the chancellor shall be a party to a suit in chancery, the bill shall be filed before the chief Justice of the state, who shall thereupon proceed, in like manner, as the chancellor could of right do, as a court of chancery in other cases, and the court of chancery shall be thereupon held in that case before the chief Justice, and shall proceed to hear and determine the same, according to the course and usage of the said court."

In this case, an incorporated company sues by its corporate name. The company consists of persons who are joint proprietors of a common fund in various amounts; the suit is the act of these persons or their officers; and the gain or loss which may result from it will be the gain or loss of each stockholder, according to the extent of his interest in the fund. The corporation is the party in form; the stockholders are the parties in substance. When a corporation is thus a party to a suit, it is regarded as one sole party, so long as it is not necessary to the ends of justice that the persons who use the corporate name should be disclosed. But whenever the ends of justice require that the persons who use the name of a corporation should be known, the inquiry is made, and the stockholders and their officers are considered and treated as they are in fact, the real litigants in the suit.

The term party, though usually applied to those who are named as such in the forms of a suit, has no technical sense more restricted than its ordinary signification. In the general sense of the term, it seems properly applied to every person who has an interest in the conduct and event of a litigation, whether he is a party in form, a party in interest, or a party not before the court. The forms of proceedings in our courts, often present nominal parties who have no real interest in the subject of a suit; but when it is necessary for any purpose of justice that the real parties not named should be brought into view, this is done, and the persons really interested are either made parties in form, or their interests are recognized with the same effect as if their names had appeared in the proceedings. Thus, while forms are preserved, substance is not disregarded, and parties in fact, as well as parties in form, are treated according to the real state of their rights, in the subject of a suit. These distinctions are known and familiar: and the terms of the statute seem sufficiently ample to embrace parties of all descriptions. The name of a corporation being used to comprehend all the stockholders in one compendious description, it would be quite as reasonable to say that the nominal plaintiff and the casual ejector, are the only parties in an action of ejectment, as to say that the body corporate, existing only in certain legal capacities, is the only party which can be recognized by a court of justice.

If the terms, party to a suit, can be in any case understood in this general sense, there is the strongest reason to believe that they are so used in this statute. The object of the legislature plainly was, to provide a judge who should hear and determine the causes which the chancellor could not decide, and these were the chancellor's own causes in equity. The chancellor could not decide any cause in which he was interested; and whether his interest should appear, by making him a party in form, or by his own avowal, or in any other manner, the principle was the same; he was in substance, a party, and for that reason could not act. In this state of things this statute was enacted to give redress. It is therefore most reasonable to suppose that the remedy was intended to extend to the whole exigency of the case: and the terms party to a suit are reconciled with this object, if we give to them the same sense in both cases, and consider the causes which are to be decided by the chief Justice as the causes which the chancellor cannot determine, because he is a party either in form or in effect. If this be not so, the legislature have accomplished but a part of their object; and wherever a party in effect, does not appear so in name, as in all cases of corporations and many cases of trusts, the chancellor may be that party, and the case would be without the redress of this statute. But the object of the legislature is completely attained, if we consider the terms, party to a suit, to be used here in the sense in which the same terms are certainly used when we speak of the principle that a judge is incompetent to determine a suit in which he is a party.

This construction is much corroborated, by an alteration which this statute has received since its first enactment. In the first act passed on the fourth day of April, 1800, and in the first revision of that act in 1801, the terms of this provision were, that where the "chancellor shall be a party to a suit in chancery, either as complainant or defendant, the bill shall be filed before the chief Justice." While these were the terms of the law, there might have been reason to contend that it was confined to cases, in which the chancellor was named as complainant or as defendant. But in the revision of 1813, the existing law, the words "as complainant or defendant," are omitted, and the provision now extends to all cases in which the chancellor is a party to a suit, and, as I conceive, to all cases in which, though neither complainant nor defendant, he is a real party to the subject of litigation.

Such is my own view of this question; but it appears that my immediate predecessor, and the late chief Justice, held a different opinion. Their opinion is found in the case of *Stewart v. The Mechanics and Farmers' Bank*, 19 John. 501. In that case, the chancellor was a stockholder in the bank; and this fact appearing, the parties consented that the hearing of the cause should proceed. Upon a consultation between the chancellor and the chief Justice, they were both of opinion that the chancellor was not a party to the suit within the provision of the statute; and the chancellor proceeded to determine the cause. The same cause was removed to the court of errors; but this

question was not raised or considered in that court. It is a question which has not been determined by the court of errors; but it has been decided by the opinions of two of our most eminent judges. I have the highest respect for the late chancellor, and the late chief Justice. I delight to honor them for the ability, intelligence, and integrity with which they discharged their respective trusts; and I feel that I have strong authority, when I am able to produce their opinions in support of my own decisions. But where my own judgment is clear and undoubting, I cannot surrender it to any opinion except that of a superior tribunal.

My opinion is, that the chancellor is a party to a suit in this court by or against a corporate company, in which he is a stockholder; that such a suit is his own cause, to the extent of his interest as a stockholder; and that he cannot determine such a suit. I am also of opinion, that the chief Justice has jurisdiction of such suits; and the circuit courts are now also open as courts of equity.

This suit having been instituted before I was chancellor, I merely direct at present, that all proceeding in it before me, cease. If the suit shall proceed before the chief Justice, it will be determined, as if it had been commenced before him, according to the statute.

## BANK OF UNITED STATES v. DEVEAUX ET AL.

1809. 5 *Cranch*, U. S. 61.<sup>1</sup>

ERROR to the U. S. Circuit Court for the District of Georgia.

The declaration describes the plaintiffs as "The President, Directors and Company, of the Bank of the United States, . . . established under an act of congress. . . ." At the close of the declaration is the following allegation: "And your petitioners aver that they are citizens of the State of Pennsylvania, and the said Peter Deveaux and Thomas Robertson are citizens of the State of Georgia."

Plea in abatement, denying the jurisdiction of the U. S. Circuit Court. Demurrer. Judgment for defendants upon the demurrer.

*Binney* and *Harper*, for plaintiffs in error.

*P. B. Key*, and *Jones*, *contra*.

MARSHALL, C. J. Two points have been made in this cause.

1. That a corporation composed of citizens of one State may sue a citizen of another State in the federal courts.

2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered. . . .

<sup>1</sup> Statement abridged. Arguments omitted.—Ed.

[The court holds, that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.]

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different States," both parties must be citizens to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an indi-

vidual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different State from the defendant, to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

The statute of Henry VIII., concerning bridges and highways, enacts, that bridges and highways shall be made and repaired by the "inhabitants of the city, shire, or riding," and that the justices shall have power to tax every "inhabitant of such city," &c., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods and chattels."

Under this statute those have been construed inhabitants who hold lands within the city where the bridge to be repaired lies, although they reside elsewhere.

Lord Coke says, "every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute."

The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself, and, consequently, this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it.

In the case of *The King v. Gardner*, reported by Cowper, 79, a corporation was decided, by the court of king's bench, to come within the description of "occupiers or inhabitants." In that case the poor rates, to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be, that the poor rates, on vacant ground belonging to a corporation, may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate *dictum* of Justice Yates, that a corporation could not be an inhabitant or occupier.

These opinions are not precisely in point; but they serve to show that, for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.



It is true that, as far as these cases go, they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name of the corporation, for the purpose of asserting their corporate rights. Still the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts, for legitimate purposes, will contemplate it more substantially.

There is a case, however, reported in 12 Mod. 669, which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle and fortify the decision.

The case of *The Mayor and Commonalty v. Wood* is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the congress of the United States had in terms enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one State might sue a citizen of another State, in the federal courts, by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one State, suing by a corporate name, and those of another State. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the Judicial Act ought to be con-

strued to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the Registering Act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized by the case in 12 Mod. (on a question of jurisdiction), to look to the character of the individuals who compose the corporation, and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

*Judgment reversed; plea in abatement overruled, and cause remanded.*

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GRIER, J., IN MARSHALL v. BALTIMORE & OHIO  
RAILROAD COMPANY.

1853. 16 Howard, 327-329.

“A CORPORATION, it is said, is an artificial person, a mere legal entity, invisible and intangible.”

This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity “cannot be a citizen” is a logical conclusion from the premises which cannot be denied.

But a citizen who has made a contract, and has a “controversy” with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representa-

tion, and have the faculty of contracting, suing, and being sued in a factitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent.

Nor is it reasonable that representatives of numerous unknown and ever-changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff's privilege. It is true that these stockholders are corporators, and represented by this "juridical person," and come under the shadow of its name. But for all the purposes of acting, contracting, and judicial remedy, they can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. The individual or personal appearance of each and every corporator would not be a compliance with the exigency of the writ of summons or *distringas*. Though, nominally, they are not really parties to the suit or controversy. In courts of equity, where there are very numerous associates having all the same interest, they may plead and be impleaded through persons representing their joint interests; and, as in the case between the northern and southern branches of the Methodist Church, lately decided by this court, the fact that individuals adhering to each division were known to reside within both States of which the parties to the suit were citizens, was not considered as a valid objection to the jurisdiction.

In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to sue and be sued. "And this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation." *Bank of Augusta v. Earle*, 13 Pet. 519. The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicile as against those who are compelled to seek them there, and can find them there and nowhere else. If it were otherwise, it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to state tribunals in cases in which, of all others, such privilege may be considered most valuable.

But it is contended that, notwithstanding the court, in deciding the question of jurisdiction, will look behind the corporate or collective name given to the party, to find the persons who act as the representatives, curators, or trustees, of the association, stockholders, or *cestui que trusts*, and in such capacity are the real parties to the controversy ; yet that the declaration contains no sufficient averment of their citizenship. Whether the averment of this fact be sufficient in law, is merely a question of pleading. If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the *habitat* of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the act of the general assembly of Maryland," is a sufficient averment that the real defendants are citizens of that State.<sup>1</sup>

<sup>1</sup> "A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation ; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. It is, therefore, necessary that it be made to appear that the artificial being was brought into existence by the law of some State other than that of which the adverse party is a citizen." STRONG, J., in *Muller v. Dows*, 94 U. S. p. 445.

## CHAPTER III.

## CREATION OF CORPORATION.

## SECTION I.

*By what Authority.*

## FRANKLIN BRIDGE CO. v. WOOD.

1853. 14 Georgia, 80.

ASSUMPSIT in Heard Superior Court. Tried before Judge HILL, Term, 1853.

The Franklin Bridge Company was incorporated under the Act of the Legislature of 1843, to prescribe the mode of incorporating companies for certain purposes, by an order of the Inferior Court of Heard County,

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorporated; contending that the act of the Legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and nonsuited the plaintiffs.

To this decision plaintiff excepted.

*Mabry*, for plaintiff in error.

*Featherston*, for defendant.

*By the Court*, LUMPKIN, J., delivering the opinion:—

Is the Act of 1843 and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the Act of 1843, it is provided "That when the persons interested shall desire to have any church, camp-ground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the

object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court *shall pass a rule or order*, directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may deem necessary; and to make such rules and regulations as they may think proper for their own government; not contrary to the laws of this State; but shall make no contracts or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act, for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the Superior and Inferior Courts respectively, the power to change the names of individuals.

Section fifth. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names, — in which case, the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this State." Cobb's Digest, 542, 543.

By the Act of 1845 the provisions of the Act of 1843 are extended to all associations and companies whatever, except banks and insurance companies; and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. Ibid.

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this: —

1. That in England, corporations are created and exist by prescription, by Royal Charter, and by Act of Parliament. With us they are created by authority of the Legislature, *and not otherwise*. That to establish a corporation is to enact a law; and that no power but the legislative body can do this.

2. That legislative power is vested under our Constitution, in the General Assembly, to consist of a Senate and House of Representa-

tives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws thus conferred upon them by the people in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the Legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise,—not even to the Judiciary, a co-ordinate department of the government, unless expressly empowered by the Constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence as well as of political science, namely, *delegata potestas non potest delegari*. That to do this would not only be to disregard the constitutional inhibition which is binding upon the representative, but by shifting responsibility introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take however of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task, in pronouncing an act of Legislature unconstitutional and void,—one which is never justifiable unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the Constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the *immediate* act of the king himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their Treatise on Corporations, state that the law has since been settled to the contrary; and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely, on the principle that *qui facit per alium facit per se*; that the persons to whom the power is delegated of establishing corporations, are only an instrument in the hands of the government. 1 Kyd, 50; 1 Black. Com.; Ang. & Am. 63.

Before the revolution, charters of incorporation were granted by the

proprietarys of Pennsylvania under a derivative authority from the Crown; and those charters have since been recognized as valid. 3 Wil-son's Lectures, 409. A similar power has been delegated by the Legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover, under the familiar maxim above mentioned. See also 1 Missouri R. 5.

5. Our opinion is that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed, — no discretion is given to the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made *obligatory* upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true the Legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven and acknowledged, and recorded in the office of the clerk of the Superior Court, where any office of the association is established, and a copy filed with the Comptroller General. Cobb's Digest, 107, 108.

And so under the Act of 1847, authorizing the citizens of this State, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration specifying the objects of their association and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the Superior Court of the county where such corporation is located, and published once a week for two months in the two nearest Gazettes; which being done, it is declared that said association shall become a body corporate and politic, and known as such, without being specially pleaded, in all courts of law and equity in this State, to be governed by the provisions and be subject to the liabilities therein specified. Cobb's Digest, 439, 440.

In these two instances, and others which might be cited, the Legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments with regard to these various associations which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.



All these Statutes were complete as laws when they came from the hands of the Legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the *acceptance* of the charter to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities, and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result therefore of our deliberation upon this case is, that the Acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the Constitution, and that the charter of the Franklin Bridge Company and all others created under them, and in conformity to their provisions, are legal and valid. With the policy of these Statutes we have nothing to do. The province of this and all other courts is *jus dicere*, not *jus dare*.  
*Judgment reversed.*

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## SECTION II.

### *Acceptance of Charter.*

#### STATE v. DAWSON ET ALS.

1861. 16 *Indiana*, 40.

APPEAL from the *Clark* Circuit Court.

PERKINS, J. Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in *January*, 1849, the Legislature of the State of *Indiana* enacted a special charter of incorporation, (which is set out at length,) for a railroad from *Fort Wayne, Indiana*, to *Jeffersonville*, to be called the *Fort Wayne and Southern Railroad*; that the persons named in the charter as directors did not accept said charter till *June 2*, 1852, when they did meet and accept the same, and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The

court below sustained a demurrer to the information ; thus holding the defendants to be a legal corporation.

The present Constitution of *Indiana* took effect on *November 1, 1851*. It contains these provisions : —

“ All laws now in force and not inconsistent with this Constitution, shall remain in force, until they shall expire or be repealed.” Sched. (1 sub. sec.) of Const.

“ Corporations, other than banking, shall not be created by special act, but may be formed under general laws.” Art 11, § 13.

“ All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall, in its discretion, modify or repeal the same.” Sched. *supra*, sub. sec. 4.

The charter for the *Fort Wayne and Southern Railroad* was not a charter for municipal purposes, and, hence, was not specially continued in existence. Art. 11, § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through, or by virtue of, such special act or charter, after *November 1, 1851*. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the Legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz : acceptance of the charter enacted.

Says *Grant*, in his work on corporations, *vide* p. 13 : “ Nor can a charter be forced on any body of persons who do not choose to accept it.” And again, at page 18, he says, “ The fundamental rule is this : no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. — *Bagge's case*, 2 Brownl. & G. 100 ; S. C. 1 Roll. Rep. 224 ; Dr. *Askew's case*, 4 Burr. 2200 ; *Rutter v. Chapman*, 8 M. & W. 25 ; per *Wilnot, J., Rex v. Vice-Chancellor of Cambridge*, 3 Burr, 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. *Townson v. Tickell*, 3 B. & Ald. 31.” See, also, Ang. & Am. § 83, where it is said, if a charter is granted to those who did not apply for it, the grant is said to be *in fieri* till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till *June, 1852*, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the State ; a consent that the persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made

by the State, in 1849, was withdrawn by the State, *November* 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her Legislature would prescribe.

This pretended corporation, then, was not created before *November* 1, 1851; and it could be created afterward only by the concurrent consent of the State and the corporators. But, at that date, the Constitution prohibited both the State and corporators from giving consent to such a corporation, to wit: one coming into existence through a special charter; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the *United States* in *Aspinwall v. Daviess County*, 22 How., p. 364; where it was held that the new Constitution prohibited a subscription of stock to the *Ohio and Mississippi Railroad Company*, authorized by the charter of the corporation, granted under the former Constitution, and actually voted by the people of the county, under that Constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old Constitution, must be determined on a trial of the cause below.

Had the provision in our Constitution, like that on this subject in the Constitution of *Ohio*, ordained that the Legislature should "pass no special act conferring corporate powers," the restraint would clearly have been imposed alone upon future legislative action; but, in our Constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See *The State v. Roosa*, 11 O. St. R. 16.

*Per Curiam.* The judgment is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

*C. B. Smith, J. W. Gordon, and Watt J. Smith*, for the appellants.  
*R. Crawford*, for the appellees.<sup>1</sup>

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## REX v. WESTWOOD.

1825. 4 *Barnewall & Cresswell*, 781.

1830. 7 *Bingham*, 1.<sup>2</sup>

*Quo Warranto* for usurping the office of burgess of the borough of Chepping Wycombe. It was admitted on the pleadings that the corporation of Chepping Wycombe has existed from time immemorial. Plea, alleging, *inter alia*, defendant's election by a select body of the

<sup>1</sup> Citations of counsel for appellees are omitted. — ED.

<sup>2</sup> Statement abridged. Arguments omitted. Only so much of the case is given as relates to one point. — ED.

burgesses, according to the custom from time immemorial. Replication, setting out a charter granted by the Crown in 15 Charles II., whereby it was granted that the entire body of burgesses should and might be able to elect new burgesses. Rejoinder, that said charter was not accepted by the then burgesses as to that part thereof which ordained the mode of electing new burgesses. Demurrer.

*Scarlett*, in support of demurrer.

*Tindal*, *contra*.

LITTLEDALE, J. . . . But then the rejoinder says the charter was not accepted in that part which relates to the election of the burgesses. I think that rejoinder is bad, because I think a corporation cannot accept a charter in part only. When a charter is given by the crown, it is considered as forming a whole scheme formed upon deliberation for the good government of the borough. Some parts of this may not be what the corporation may like in themselves; but the crown, on the other hand, may have granted them other valuable privileges as a sort of compensation for the inconvenience and trouble they might suffer from other parts. But the corporation would never have had the valuable parts unless they had had some of the troublesome ones also. In *The King v. The Vice Chancellor of Cambridge*, 3 Burr. 1647, it was considered by Lord *Mansfield*, that a corporation might accept a charter in part. In page 1656, he says, "but there is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is granted) and a new charter given to a corporation already in being, and acting either under a former charter, or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it; they may act partly under it, and partly under their old charter or prescription." And Mr. Justice Wilmot, 3 Burr. 1661, says, "It is the concurrence and acceptance of the university that give the force to the charter of the crown, and they may take and accept the body of statutes or code of laws separately and distinctly; they are not bound to take all, or leave all." But though such is the law laid down it was not necessary to do so, because the office of High Steward was an ancient office existing long before the statutes of Queen *Elizabeth*, and from the language of those statutes, it is plain, the crown did not mean to interfere with the mode of electing the ancient officers in the university, except such as were particularly mentioned; and a question lately arose in this court upon the construction of one of those statutes, whether a particular professorship fell within the meaning of it, viz., that all officers where the mode of election was not pointed out, should be elected as the Vice-Chancellor. That was not a general charter given to the university to form the whole constitution of it, but a selection of statutes for the election of particular officers, and it is by the aggregate of different statutes given at different times by the crown, that the university is governed. In *The King v. Amery*, 1 T. R. 589, Buller, J., says, "The averment proceeds on a

mistake by supposing that a charter may be accepted in part and rejected as to the rest. The only instance in which I have ever heard it contended that a charter could be accepted in part only, is where the king has granted two distinct things, both for the benefit of the grantees; there I know that some have thought that the grantees may take one, and reject the other. However that may be, it cannot extend to this case. This corporation must either have accepted in toto, or not at all. If they could have accepted a part only of the charter, they would have been a corporation created by themselves, and not by the king. If a charter directed that the corporation should consist of a mayor, aldermen, and twenty-four common councilmen, they could not accept the charter for the mayor and aldermen only, omitting the common councilmen." There not being any case where I consider the point as having distinctly come in judgment, there are only the opposite *dicta* of judges to guide us, and then I must give my judgment in that way which appears most consonant to the general principle of law as applicable to grants of the crown, that the grantees must take the whole of one entire thing which the crown grants, or none at all. Therefore, the rejoinder is no answer to the replication to the first and second pleas, and judgment must be for the crown on that part of the record.

[Omitting other opinions.]

*Judgment for the Crown on the first two pleas. For the defendant upon the third plea.*

[A writ of error was brought to the House of Lords, where it was argued that the judgment ought to be reversed upon another point.

LORD TENTERDEN delivered an opinion, from which the following is an extract.]

Two questions of law, therefore, have arisen upon this record; the first, whether it is competent to an existing corporation, to whom a charter of the crown is offered, to accept that charter in part and reject it in part; or if it accept it in part, whether that must not be taken to be an acceptance of the whole? Upon that point there never has been any difference of opinion among the learned Judges. There are, indeed, to be found some expressions of Judges in former times importing that a corporation might accept part of a charter and reject the remainder; but of late times all Judges have been of opinion that it is not open to a corporation; otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred upon them; and accordingly there was judgment in the court below for the crown upon that point, namely, that the allegation that the charter was accepted in part was a bad allegation.

*Judgment affirmed.*

## SECTION III.

*Conditions precedent to Incorporation De Jure.*

## PEOPLE v. MONTECITO WATER CO.

1893. 97 California, 276.

[In Department Two.<sup>1</sup>] Appeal from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

*John J. Boyce, Richards & Carrier*, and *George H. Gould*, for appellant.

*W. C. Stratton*, for respondents.

TEMPLE, C. Plaintiff appeals from a judgment entered upon demurrer to complaint. The demurrer was general, and on the ground of insufficiency of the facts. It is a proceeding taken by the attorney general of the state, in the nature of a quo warranto, to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds — First, for want of a substantial compliance with the statutory requirements in its formation; and second, for abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point the respondent raises the preliminary objection that, by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition the case of the *People v. Stanford*, 77 Cal. 360, 18 Pac. Rep. 85, and 19 Pac. Rep. 693, is chiefly relied upon. In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment; that it was not and never had been such a person. There is no such inconsistency here. It is averred that the corporate defendant is a corporation de facto, but it is claimed that it did not become a corporation de jure, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character. Section 358, Civil Code. This court said in *People v. La Rue*, 67

<sup>1</sup> As to the Departments of the Supreme Court, and as to Supreme Court Commissioners, see Preface to 97 California, pp. v-vii.

Cal. 530, 8 Pac. Rep. 84, and repeated the language in *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. Rep. 60: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Under such circumstances it seems clear that the corporation is not only a proper, but a necessary party. *People v. Flint*, 64 Cal. 49, 28 Pac. Rep. 495; *People v. Gunn*, 85 Cal. 244, 24 Pac. Rep. 718.

It is contended that the corporation is not rightfully such because, while five incorporators signed the articles of incorporation, only four acknowledged the same. Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." It was said in *People v. Selfridge*, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial, rather than a literal, compliance will suffice. *People v. Stockton & V. R. Co.*, 45 Cal. 313. Was there substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial, rather than a literal, compliance, may be illustrated from the cases. In *Ex parte Spring Valley Waterworks*, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal, but the only, place of business." In *People v. Stockton & V. R. Co.*, 45 Cal. 306, the affidavit required in such cases to be attached to the certificate stated that 10 per cent of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent had been actually in good faith paid in. It was held sufficient, and it would seem that, if it was actually paid in cash, it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash. In *People v. Cheeseman*, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons

who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged. In all these cases it will be seen that the thing required was done, but not literally as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of *Larrabee v. Baldwin*, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a *de facto* corporation must be considered, under our Code, as possessing a corporate character; and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law. In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly it was unnecessary to consider the question. The curative act referred to declares: "All associations or companies heretofore organized, and acting in the form and manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to take such acknowledgments, are hereby declared to be, and to have been, corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault, and properly acknowledged before the proper officer; and all such certificates are hereby validated, and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc. St. 1863-64, p. 303. Section 292 of the Civil Code requires the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state, and all concerned, against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures. If the acknowledgment can be dispensed with as to one, why not as to two or three, or all? Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney general would not have instituted this inquiry if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged; but, as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a



de facto corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

DE HAVEN, J., MCFARLAND, J., FITZGERALD, J.

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### NEWCOMB v. REED.

1866. 12 *Allen*, 362.

• CONTRACT, in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the superior court, before *Ames, J.*, without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

*C. B. Goodrich & E. Avery*, for the plaintiff.

*E. Merwin*, for the defendants.

HOAR, J. The defence to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by *St.* 1855, c. 140.

The case of *Uiley v. Union Tool Company*, 11 *Gray*, 139, is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation persons who had been summoned in an action against it under *St.* 1851, c. 315, the plaintiff must prove the legal existence of the corporation. The alleged corporation had no charter or act of incorporation from the legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint stock companies, *St.* 1851, c. 133. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and

the place in which the corporation was established. The court say, "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this, there was an act of incorporation from the legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of *Lechmere Bank v. Boynton*, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in *Lechmere Bank v. Boynton*, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the Commonwealth impose.

The defendant Brackett, who was treasurer in February 1861, appears to have been liable with the directors under the provisions of Gen. Sts. c. 60, §§ 18, 20, 31.

*Exceptions sustained.*

## CHERAW & CHESTER R. CO. v. WHITE.

1880. 14 *South Carolina*, 51.<sup>1</sup>

WILLARD, C. J. This action was brought to recover the amount of a subscription to the capital stock of the plaintiff company, alleged to have been made by the defendant, and not duly complied with on his part. The defendant demurred to the complaint on various grounds. This demurrer was overruled by the Circuit Court, and leave to answer granted on terms. From this decision the defendant now appeals.

The first ground of demurrer is, that the plaintiff has no capacity to sue. Several propositions are stated under this ground of demurrer that, in substance, involve the general proposition that the plaintiffs have received, by law, only authority to become a corporation upon the performance of certain conditions precedent, and that the complaint contains no allegations showing that such conditions have been performed.

The act to charter the plaintiff company, passed February 27th, 1873, (15 *Stat.* 442,) confers corporate powers on the incorporators named, in terms importing an immediate grant, with the following proviso annexed: "Provided that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years." The period of completion is stated by Section 6 at seven years, but this conflict of time is not material to the present question. The question is whether the proviso can have the effect to convert a grant of the corporate franchise, made in terms that import an immediate grant, into one taking effect only upon the happening of a certain contingency. If the purpose intended by the proviso cannot be fully accomplished without a limitation of the broad sense of the language conferring the franchise, then such effect can be accomplished consistently with the rules of construction, for, in that case, the proviso would be necessarily interpreted as a condition in substance and effect. As a condition subsequent this is undoubtedly the effect of the proviso, but does it contain, in itself, anything that imports a necessity that it should operate as a condition preced-

<sup>1</sup> Statement omitted. Only so much of opinion is given as relates to one point. — Ed.

dent? Two things are to be considered in this respect: *First*. What is essential to the full efficacy of the matter of the proviso itself? *Second*. What would be the effect of allowing it to stand as a condition precedent on the completeness of the powers granted for the purpose intended by the grant, and to which the terms of the proviso stand as a condition? It certainly was intended that the corporators should have all the powers and capacity properly incident to a railroad corporation for the purpose of enabling it to commence and complete the road in the times prescribed by the law, for it must be assumed that the construction of the road was deemed a public benefit, and that the acquisition of that benefit to the public was the true consideration of the grant, and, in this light, the proviso must be regarded as directly intended as a means of hastening its construction. This view also excludes the idea that the proviso was intended to limit the capacity or powers of the company to construct the road within the times prescribed for that purpose. It must certainly be assumed that the possession of corporate powers during the time that the company was organizing and acquiring the capital and credit requisite to construct the road was a material aid toward the accomplishment of that result. It is fair, then, to assume that the grant, in terms importing immediate corporate capacity, was intended to operate as such for the purpose of conferring on the corporation the most perfect means for accomplishing that which it was the purpose of the proviso to secure. So far then from its being essential to the efficacy of the proviso that the sense of the terms granting, directly, the corporate franchise should be narrowed, the purpose of the proviso is best subserved by holding these powers intact according to the terms in which they were granted. If, at the end of two years, the corporation had not commenced to construct the road, every object intended to be secured to the state and to the public, by the limitation, would be fully attained, even if the company had at once, upon the granting of the charter, become a corporation. The extinguishment of the franchise of building and operating a railroad would have followed, and the right to exercise the functions of a corporation would have fallen with it as an accessory. On the other hand if the grant is held to be subject to a condition precedent, by reason of the limitation as to commencing work in two years, the argument that would produce that result would go a step further and make the completion of the road a condition precedent. In that case the anomaly would be presented of a company undertaking the construction and completion of a work of such magnitude without the powers of a corporation, and only hoping to obtain such powers when the work had been accomplished. Such an intention cannot be ascribed to the statute. It is clear that the demurrer was properly overruled as it regards the ground just considered.

. . . . .

*Judgment affirmed.*

## BRODERIP v. SALOMON.

1895. *L. R.* (1895) 2 *Chan.* 323.<sup>1</sup>

IN 1892, Aron Salomon was carrying on business as a leather merchant &c., and was solvent. July 28, 1892, a Limited Company was registered for the ostensible purpose of taking over and carrying on the business then conducted by Salomon. The memorandum of association was subscribed by Salomon, his wife, his daughter, and his four sons, each subscribing for one share. Aron Salomon afterwards had 20,000 shares allotted to him. No one else ever had a share. Debentures to the amount of 10,000*l.*, constituting a first charge on the assets, were issued to Salomon. These debentures were subsequently cancelled, and other debentures for the same amount were, at the request of Salomon, issued in 1893 to Broderip, as a security for 5000*l.* lent by him to Salomon, which sum Salomon shortly afterwards lent to the Company at 10 per cent interest. Oct. 11, 1893, Broderip commenced an action on behalf of himself and all the debenture holders, to enforce his security. Oct. 25, an official receiver was appointed. Oct. 26, an order was made for compulsory winding up. The Company put in a defence and counter-claim, making Salomon a party to the counter-claim. At the time of the Company's going into liquidation, 11,264*l.* was due to unsecured creditors whose debts had been contracted since the formation of the Company. About 7733*l.* of this was due to trade creditors, the rest to Salomon. The liquidator has realized the assets, by arrangement without prejudice to any question on the counter-claim. He has paid Broderip's "mortgage debt on the debentures," and the rest of the proceeds will not be sufficient to satisfy what remains due on the debentures. Salomon claims whatever there may be as owner of the debentures.

The action was tried before VAUGHAN WILLIAMS J. [The following is an abridgment of the opinion of the learned Judge.]

There was no fraud on the shareholders, inasmuch as they were all perfectly cognizant of the conditions under which the Company was formed, and as there was no intention to allot further shares at a later period to outsiders. But the Company was a mere nominee of Salomon's; and the case is to be dealt with as if the nominee, instead of being the Company, had been some individual agent of Salomon's to whom he had purported to sell this business. In that case the trustee in bankruptcy of the agent would have had a right to make Salomon indemnify the agent against the debts that he had contracted by the direction of his principal. The right of the liquidator in the present case is precisely the same, notwithstanding the debentures which were a mere form, intended to give an appearance of reality to a sale which,

<sup>1</sup> Statement rewritten. Arguments omitted; also portions of opinions. — Ed.

in fact, was no sale at all, because it was a sale by a man to an agent for his own profit. This business was Salomon's business, and no one else's. The creditors of the Company could, in my opinion, have sued Salomon. Their right to do so would depend on the circumstances of the case, whether the Company was a mere *alias* of the founder or not. The relationship of principal and agent existed between Salomon and the Company. The moment the creditors succeed in establishing the identity of Salomon with the Company, the creditors of the Company thereupon are shown to be the creditors of Salomon; and although it is necessary, in order to get rid of the priority given to Salomon by these debentures, that one should fall back upon the lien of the Company as his agent, whom he was bound to indemnify, I do not mean to exclude from my judgment that the debentures were given to Salomon by his agent, the Company, and that the necessary effect of Salomon as principal, taking these debentures from his agent, the Company, was that his creditors—for, according to my view, the creditors of the Company were his creditors—were defeated and delayed by the debentures.

His Lordship made the following order:—

Declare that the plaintiffs, A. Salomon & Co. Limited, or the liquidator thereof are, or is entitled to be indemnified by the defendant A. Salomon against the sum of 7733*l.* 8*s.* 3*d.* . . .

Order and adjudge that the plaintiffs, A. Salomon & Co. Limited, do recover against defendant A. Salomon the said sum of 7733*l.* 8*s.* 3*d.*

Declare that plaintiffs, A. Salomon & Co. Limited, are entitled to a lien for the said sum of 7733*l.* 8*s.* 3*d.*, upon all sums which would be payable to defendant A. Salomon out of the assets of the plaintiffs A. Salomon & Co. Limited, in respect of the debentures issued by the said Company to the defendant E. Broderip in the pleadings mentioned or otherwise, and that the defendant A. Salomon is not entitled to make any claim against the assets of the plaintiffs A. Salomon & Co. Limited, until the said sum of 7733*l.* 8*s.* 3*d.* has been satisfied.

Aron Salomon gave notice of appeal. The Company gave a counter-notice of contention that [*inter alia*] they were entitled to have the agreement for the sale of Salomon's business and property to the Company rescinded.

*Buckley, Q. C.* and *Muir Mackenzie (McCall, Q. C.* with them), for Salomon.

*Farwell, Q. C.* and *Theobald*, for the company.

LINDLEY L. J. This is an appeal by Mr. Aron Salomon against an order made by Vaughan Williams J., and which, in effect, directs Mr. A. Salomon to indemnify a limited company formed by him against the unsecured debts and liabilities incurred by or in the name of the company whilst it carried on business.

The appeal raises a question of very great importance, not only to the persons immediately affected by the decision, but also to a large number of persons who form what are called "one-man companies."

Such companies were unheard of until a comparatively recent period, but have become very common of late years.

The material facts of this case are as follows : [His Lordship, after stating the facts of the case to the same effect as above, and adding that as to the 20,000 shares allotted to Aron Salomon he (Aron Salomon) contended he had paid for them though no call had ever been made ; that the liquidator, on the other hand, claimed 20,000*l.* from A. Salomon in respect of these shares ; that A. Salomon had received moneys from the company, but that it did not appear whether he had paid the company for his shares, and that this was a matter which it was unnecessary to pursue further on the present occasion, proceeded as follows :—]

I proceed to examine the legal aspect of this case, which, as I have said, is one of great general importance. There can be no doubt that in this case an attempt has been made to use the machinery of the Companies Act, 1862, for a purpose for which it never was intended. The legislature contemplated the encouragement of trade by enabling a comparatively small number of persons—namely, not less than seven—to carry on business with a limited joint stock or capital, and without the risk of liability beyond the loss of such joint stock or capital. But the legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. In truth, the legislature clearly intended to prevent anything of the kind, for s. 48 takes away the privilege conferred by the Act from those members of limited companies who allow such companies to carry on business with less than seven members ; and by s. 79 the reduction of the number of members below seven is a ground for winding up the company. Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the legislature intended not to be done ; and, ingenious as the scheme is, it cannot have the effect desired so long as the law remains unaltered. This was evidently the view taken by Vaughan Williams J.

The incorporation of the company cannot be disputed. (See s. 18 of the Companies Act, 1862.) Whether by any proceeding in the nature of a *scire facias* the Court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion ; but, be that as it may, in such an action as this the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members, although six of them hold only one *l.* share each, Mr. Aron Salomon cannot be reached under s. 48, to which I have already alluded. As the company must be recognized as a corporation, I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in

its name are not enforceable against it in its corporate capacity. But it does not follow that the order made by Vaughan Williams J. is wrong. A person may carry on business as a principal and incur debts and liabilities as such, and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams J. as the agent of Aron Salomon. I should rather liken the company to a trustee for him — a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr. Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability. This view of the case is quite consistent with *In re George Newman & Co.*<sup>1</sup> In a strict legal sense the business may have to be regarded as the business of the company; but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr. Aron Salomon's liability to indemnify the company in this case is, in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr. Aron Salomon has come under. His liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it. There are many small companies which will be quite unaffected by this decision. But there may possibly be some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them.

It is idle to say that persons dealing with companies are protected by s. 43 of the Companies Act, 1862, which requires mortgages of limited companies to be registered, and entitles creditors to inspect the register. It is only when a creditor begins to fear he may not be paid that he thinks of looking at the register; and until a person is a creditor he has no right of inspection. As a matter of fact, persons do not ask to see mortgage registers before they deal with limited companies; and this is perfectly well known to every one acquainted with the actual working of the Companies Acts and the habits of business men. Mr. Aron Salomon and his advisers, who were evidently very shrewd people, were fully alive to this circumstance.

<sup>1</sup> [1895] 1 Ch. 674.



If the legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, as it may think necessary. But until the law is changed such attempts as these ought to be defeated whenever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use, and by making it an instrument for cheating honest creditors.

Mr. Aron Salomon's scheme is a device to defraud creditors.

Agreeing as I do in substance with Vaughan Williams J., I do not think it necessary to investigate the question whether the so-called sale of the business to the company ought to be set aside. The only object of setting it aside is to obtain assets wherewith to pay the creditors, and this object can be attained on sound legal principles by the order which he has made. In the event, however, of this case going further, I will add that I regard the so-called sale of the business to the company as a mere sham, and that in my opinion it might, if necessary, be set aside by the company in the interest of its creditors, although all the shareholders, such as they were, knew of and assented to the arrangement. They were simply assisting Mr. Aron Salomon to carry out his scheme. I cannot regard *In re British Seamless Paper Box Co.*<sup>1</sup> as an authority against a rescission of such a transaction as this.

We have carefully considered the proper form of order to be made on this appeal, and the order of the Court will be as follows: The Court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs; and, it being unnecessary to make any order on the liquidator's cross-notice of appeal, discharge the order directing the liquidator to pay costs of the counter-claim, and give him those costs.

LOPES L. J. This is a case of very great importance, and I wish shortly to state my reasons for concurring in the judgment just delivered. I do not propose to restate the facts so fully and clearly detailed by Lindley L. J.: I shall content myself with shortly stating the impression they have produced on my mind. The incorporation of the company was perfect — the machinery by which it was formed was in every respect perfect, every detail had been observed; but, notwithstanding, the business was, in truth and in fact, the business of Aron Salomon; he had the beneficial interest in it; the company was a mere *nominiis umbra*, under cover of which he carried on his business as before, securing himself against loss by a limited liability of 1*l.* per share, all of

<sup>1</sup> 17 Ch. D. 467.

which shares he practically possessed, and obtaining a priority over the unsecured creditors of the company by the debentures of which he had constituted himself the holder.

It would be lamentable if a scheme like this could not be defeated. If we were to permit it to succeed, we should be authorizing a perversion of the Joint Stock Companies Acts. We should be giving vitality to that which is a myth and a fiction. The transaction is a device to apply the machinery of the Joint Stock Companies Act to a state of things never contemplated by that Act — an ingenious device to obtain the protection of that Act in a way and for objects not authorized by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions. It never was intended that the company to be constituted should consist of one substantial person and six mere dummies, the nominees of that person, without any real interest in the company. The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalize such a transaction would be a scandal.

But to what relief is the liquidator entitled? In the circumstances of this case it is, in my opinion, competent for the Court to set aside the sale as being a sale from Aron Salomon to himself — a sale which had none of the incidents of a sale, was a fiction, and therefore invalid; or to declare the company to be a trustee for Aron Salomon, whom Aron Salomon, the cestui que trust, was bound to indemnify; or to declare the formation of the company, the agreement of August, 1892, and the issue of the debentures to Aron Salomon pursuant to such agreement, to be merely devices to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further, to enable him to obtain a preference over other creditors of the company by obtaining a first charge on the assets of the company by means of such debentures. I wish to add that I am inclined to think that a scire facias would go to repeal the certificate of incorporation; but I express no decided opinion on the point. The appeal will be dismissed with costs.

[KAY L. J. delivered a concurring opinion.]<sup>1</sup>

[An appeal from the above decision in *Broderip v. Salomon* has recently been argued in the House of Lords. An abstract of any decision which may there be given will probably be inserted in an appendix to this volume. — ED.]

<sup>1</sup> See *Montgomery v. Forbes*, in next section. — ED.

## SECTION IV.

*Corporations De Facto. Associations which are neither Corporations De Jure nor Corporations De Facto.*

## FINNEGAN v. NOERENBERG.

1893. 52 *Minnesota*, 239.<sup>1</sup>

GILFILLAN, C. J. Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, ch. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to \$599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because — *First*, the act under which it attempted to become incorporated, to wit, Laws 1870, ch. 29, is void, because its subject is not properly expressed in the title; *second*, the act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; *third*, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a *quo warranto*, or an action in the nature of *quo warranto*, in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*, — that is, a corporation from the fact of its acting as such, though not in law

<sup>1</sup> Statement and arguments omitted. — Ed.

or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by Selden, J., in *Methodist, etc., Church v. Pickett*, 19 N. Y. 482, as “(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law.” This statement was apparently adopted by this court in *East Norway Church v. Froislie*, 37 Minn. 447, (35 N. W. Rep. 260;) but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: “When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally.”

To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the *status* of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the *status* of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson v. Corser*, 34 Minn. 355, (25 N. W. Rep. 799,) in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required.

“Color of apparent organization under some charter or enabling act” does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure*; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

[The Court then held, that the subject of the act was properly expressed in the title, and that the statute authorized the formation of corporations for the purposes stated in the articles signed by these defendants. The opinion then proceeds as follows:] The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*.

The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

*Judgment [for defendants] affirmed.*

BUFFALO & ALLEGANY R. CO. v. CARY, ADM'R.1862. 26 *New York*, 75.

APPEAL from the Superior Court of Buffalo. Action upon the subscription of the intestate to the capital stock of the plaintiff. The plaintiff undertook to become incorporated under the general railroad act of 1850. In May, 1853, its articles of association were filed, and the intestate, June 8th thereafter, became a subscriber for one thousand dollars of the capital stock, and paid ten per cent at the time of subscribing, and died in September, 1853. The directors, after his death, made seven calls upon the stock of one hundred dollars each, and for this seven hundred dollars, claimed to be due, this action was brought. The affidavit indorsed upon and filed with the articles of association was conceded to be defective; it containing no statement of an intention in good faith to construct or operate the road mentioned in the articles. In 1858 a law was passed by the legislature of this State authorizing the plaintiff to sell its property and effects to another railroad company; and, by the second section of the act, the plaintiff was declared to be a valid corporation, duly organized under the act to authorize the formation of railroad corporations and to regulate the same, passed April 2d, 1850, and the several acts amending the same, notwithstanding any error, informality, insufficiency, act or omission, on the part of such company or any of its stockholders in the proceedings to become incorporated, and the said corporation and all the proceedings of its stockholders and officers were thereby legalized and confirmed. By another section, it was provided that nothing contained in this act should affect any suit before then commenced in any court. Upon the trial, the plaintiff offered in evidence certified copies of the articles of association filed with the county clerk and comptroller, and they were objected to, on the ground of the defect in the affidavit. The plaintiff then read in evidence the act of 1858, and thereupon the court overruled the objection, and the articles of association were read in evidence, and the defendant excepted. The plaintiff then gave evidence of the election of directors and officers, June 1, 1853, and the purchase of the route of the proposed road after such election, and that contracts were made for its construction, and that the contractors entered upon the work and that money was paid on various subscriptions to the capital stock and expended on the road, and liabilities incurred in the construction. Evidence was given of the various calls for payment upon the stock, counted upon in the complaint. At the close of the evidence the defendant moved for a nonsuit, on the ground that the plaintiff had failed to prove its corporate existence at any time prior to the passage of the act of 1858, if at all; and that the defendant was not liable on the subscription of the intestate. The motion was denied, and the defendant excepted. Judgment was given for the plaintiff for

the full amount claimed, which was affirmed at general term, and the defendant appealed to this court.

The case was submitted to the court upon printed briefs and points by

*Ashur P. Nichols*, for the appellant.

No one appearing for the respondent.

DENIO, Ch. J., DAVIES, WRIGHT, GOULD and SMITH, Js., were for affirming the judgment. Their reasons were not put in writing. Those of the court below were delivered by MASTEN, J., as follows:—

The defendant contends that the plaintiff's organization is defective, because the affidavit annexed to the articles of association does not contain the allegation required by the statute, "that it is intended in good faith to construct or to maintain and operate the road mentioned in the articles of association," and that it is not therefore a corporation. The articles of association are in due form, and the affidavit annexed to them, while it does not come up to the requirement of the statute in the particular specified, is colorable. The articles and affidavit were filed and recorded in the office of the secretary of state; the capital stock was subscribed and partly paid in; the route of the road was surveyed and located; the right of way obtained; a contract for the construction of the whole road entered into and liabilities incurred which have not been satisfied. This was sufficient to constitute the plaintiff a corporation *de facto*, so that neither it nor its stockholders can object that it is not strictly a corporation *de jure*.

I am of the opinion that, under this and similar general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person.

Any other rule, it seems to me, must be fraught with serious consequences and great public mischief. Most of the persons who subscribe in good faith for the stock, do not examine to see whether all the requirements of the statute in the organization of the corporation have been complied with; and if they did examine would not probably discover a defect like the one now pointed out. The stock is sold in market from hand to hand without any such examination. The corporation may carry on its business for years, and its stock have entirely changed hands, when its property may be destroyed by a trespasser, and in an action against him in the name of the corporation his only defence, "you are not legally a corporation by reason of a defect in your constitution," would (upon the doctrine contended for by the defendant) be successful. The doctrine of estoppel could not be applied in that case, as it has been in some cases, to counteract an erroneous decision upon the question now before me.

I am aware that there are decisions in the Supreme Court, beginning

with *The First Baptist Society v. Rapalee* (16 Wend. 605), upon the point now presented to us, in conflict with the opinion I have here expressed. Their error is, in not recognizing the distinction between what is sufficient to constitute a corporation *de facto* and what is necessary to constitute one *de jure*, and how and by whom a corporation *de facto* may be shown not to be a corporation *de jure*. The State alone can take advantage of a defect in the constitution of a corporation like the one in this case. In its action it will be governed by public policy and considerations. And it has declared that it will not take advantage of the defect in the plaintiff's constitution. I think the Court of Appeals has settled the principle as I have stated it. (*Eaton v. Aspinwall*, 19 N. Y., 119.)

ALLEN, J., (dissenting.) The plaintiff's right to recover must, I think, depend upon the validity and sufficiency of the proceedings for their incorporation under the general act of 1850. The question is upon the validity of the contract alleged to have been made by the intestate by his subscription on the 8th of June, 1853; and the tests of its validity must be applied as of that date. There is no evidence that he did anything, after that time, recognizing the existence of the corporation, and up to that time there had been no user of the franchise which would estop any one from disputing the corporate existence of the plaintiff. All that had been done under the articles of association was, that the persons named as directors had come together and chosen from their number a president, secretary, treasurer and other officers. This was in no sense a user of any corporate franchise extended to the body as a corporation by the laws of the State. By thus getting together, calling themselves a corporation and electing officers, they did not become a corporation *quoad* third persons and the people, so that their corporate existence could only be questioned by the Attorney-General upon a *quo warranto*. Had they, on the 2d day of June, 1853, brought an action as a corporation, no one would claim that this formal election of officers was such a user of a corporate franchise as to constitute them a corporation *de facto*. And yet that was all there was when the plaintiff subscribed; and if they were not then a corporation, either *de jure* or *de facto*, the contract was invalid, and the subsequent acquisition by the plaintiff of certain corporate rights, as against third persons and the public, by usurpation, could not inure by relation to establish a contract against an individual having no subsequent concern or dealing with the Company. A single act in the exercise of the franchise claimed would not be a user, within the rule that makes a user evidence of corporate existence; still less is the preparation to enter upon the user sufficient to establish the existence of a corporation. The user of a corporate franchise has never, so far as cases have come to my notice, been relied upon or regarded as evidence of corporate existence in actions upon subscriptions to the capital stock. Indeed it could not be, for the reason that contracts of that character are incident to the creation of the corporation. In some cases

a person dealing with a corporation is estopped from denying its existence. (Angell & Ames on Corp., § 94.) But in this court, as well as in other courts, in actions upon subscriptions to the capital stock, the question of the creation and existence of the corporation has been regarded as an open question, and the subscriber has not been concluded by his subscription. The questions made in the cases that have been before this court would have been very easily disposed of, had the doctrine of estoppel been deemed applicable; and the fact that the proceedings for the incorporation have been examined and cases disposed of upon the merits, is very high evidence that the subscriber is at liberty to controvert the existence of the corporation. (*Eastern Plankroad Co. v. Vaughan*, 14 N. Y., 546; *Buff. and Pittsburgh R. R. Co. v. Hatch*, 20 id., 157.) There is good reason why the party should not be held to have admitted the existence of the corporation by his subscription. The consideration of his undertaking is the shares of stock which he receives, or expects to receive, from the corporation. If the company has not been legally incorporated, the stock, as such, is of no value: it has no existence. He agrees to pay for what he cannot get, and hence his promise is *nudum pactum*. It was decided, in *The First Baptist Society v. Rapalee* (16 Wend., 605), that a promise in writing to pay a certain sum to the trustees of a certain church did not estop the promisor from requiring proof, or, in other words, from denying the incorporation of the church. (*Welland Canal Co. v. Hathaway*, 8 Wend., 480; *Central Turnpike Corporation v. Valentine*, 10 Pick., 142; *Proprietors of Norwich and Lowestaff Navigation v. Theobald*, 1 Mood. & Malk., 151; *Schenectady and Saratoga Plankroad Company v. Thatcher*, 1 Kern., 102; *Rensselaer and Washington Plankroad Co. v. Wetsel*, 21 Barb., 56; *Hamilton and Deansville Plankroad Co. v. Rice*, 7 id., 157); all of which, with the exception of the first, were actions upon stock subscriptions, and in all of which the question of the proper organization and incorporation of the plaintiff was made by the defendants and considered by the court. *Valk v. Crandell* (1 Sandf. Ch., 179,) was the case of a subscription intermediate an irregular organization of a banking association, by a certificate not in conformity with the statute, and a formal perfect organization by filing a certificate as required by law, and it was held that the subscription and the mortgage given as security were void. It does not need the citation of authority to the proposition that a party, seeking to avail himself of a special privilege or franchise under a statute, must bring himself strictly within the terms of the act, the benefit of which he seeks. The principle is elementary. The statute authorizing the creation of corporations, by the voluntary association of individuals for that purpose, must be strictly pursued. A compliance with the statute is a condition precedent to the existence of the corporation. No act required by the statute as a preliminary to the formation of the corporation can be omitted as non-essential. In *The Eastern Plankroad Company v. Vaughan* (*supra*), stress was



laid upon the fact that the documents mentioned and called for by the statute contained all that was, in terms, required to be inserted in them ; thus conceding that any departure from the statute, in omitting to comply with a positive requirement, would have been fatal. In *Buffalo and Pittsburgh Railroad Company v. Hatch* (*supra*), judgment was given for the plaintiff, for the reason that there was a substantial compliance with the statute in all respects ; and the same remark applies to the case of *The Schenectady and Saratoga Plankroad Company v. Thatcher*. It is only on compliance with the provisions of this act that the articles of association may be filed in the office of the Secretary of State, and the associates become a corporation. (Laws of 1850, p. 211, § 1.) Section 2 of this act forbids the filing and recording of the articles of association and the incorporation of the associates, until there is indorsed upon or annexed to such articles an affidavit, made by at least three of the directors named in the articles, stating, among other things, that "it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association." This is omitted in the affidavit filed with the plaintiff's articles of association. The statute required some evidence of the good faith of the associates, and prescribed this as the evidence to be presented. When the legislature parted with their discretion and supervisory control in the matter of creating railroad corporations, it was fit and proper that the public should, so far as was practicable, be protected against fraudulent or speculative organizations under the general act, and hence the requirement of not only the subscription and payment of a given sum per mile of the proposed road, but an affidavit of the *bona fide* intent to carry into effect the object of the proposed corporation. The omission of this part of the required affidavit was fatal to the proceedings for the incorporation of the plaintiff. It was so regarded by the plaintiff and by the legislature, and hence the act of 1858 was passed. That act legalized the acts of the corporation from the first, and to some extent and for some purposes gave them the same rights as against third persons and the public which they would have had if the proceedings for their incorporation in the first instance had been perfect and regular. But the act could not have a retroactive effect so as to give vitality to an executory contract with a stranger void in its inception, for the reason that there was no corporation capable of contracting. If the intestate was not bound by his promise when made, no subsequent act of the legislature could create a liability. The legislature can neither make nor unmake contracts for parties. The Constitution, as well as the well defined limits of legislative power, aside from the express prohibition of the Constitution, forbid this.

The judgment should be reversed and a new trial granted, costs to abide event.

SUTHERLAND, J., also dissented ; SELDEN, J., expressed no opinion.

*Judgment affirmed.*

## MONTGOMERY v. FORBES.

1889. 148 Mass. 249.

CONTRACT, to recover the price of goods sold and delivered.

At the trial in the Superior Court, before *Dewey, J.*, the only question was whether the goods were sold to a corporation called the Forbes Woolen Mills, or to the defendant as doing business under that name. The plaintiffs introduced evidence tending to show that subsequently to May, 1885, they received an order for the goods by a letter, written upon paper with the printed heading, "Incorporated 1885. Forbes Woolen Mills. George E. Forbes, Treasurer," and signed, "Forbes Woolen Mills by Geo. E. Forbes, Treasurer"; that they thereupon shipped the goods to the Forbes Woolen Mills and received in payment therefor three promissory notes, together equal to the price of the goods, signed "Forbes Woolen Mills by Geo. E. Forbes, Treasurer"; that when they sold the goods and took the notes, they understood from their correspondence with the defendant, as well as from information gained from a commercial agency, that the Forbes Woolen Mills were a corporation, and made all charges on their books against them as a corporation, and took the notes from the defendant as the notes of a corporation; and that after they sold the goods and received the notes they became satisfied there was no such corporation as the Forbes Woolen Mills; and contended that they were entitled to recover the price of the goods from the defendant personally.

The defendant contended that the Forbes Woolen Mills was a corporation, and testified that he purchased the goods as treasurer of the Forbes Woolen Mills, but admitted that they had not been paid for except by the notes, which themselves had not been paid; that in May, 1885, for the purpose of limiting his personal responsibility, and because the tax laws of New Hampshire were more favorable to corporations than the Massachusetts laws, he went to Nashua, New Hampshire, to form a corporation for the manufacture of woollen goods; that he employed an attorney at law of Nashua to incorporate the company in a legal and proper manner, under the laws of that State, and subsequently paid him for his services and disbursements in the premises; that he went to Nashua again, and with the attorney and three other persons, selected and secured by the attorney, signed and executed an agreement of association, which was dated May 6, 1885, and was duly recorded in the office of the Secretary of State of New Hampshire on May 12, 1885, and in the office of the clerk of the city of Nashua on May 13, 1885, and recited that the subscribers associated themselves for the purpose of forming a corporation, to be called the Forbes Woolen Mills, the amount of the capital stock to be twenty thousand dollars, divided into four hundred shares of fifty dollars each; and that the object of the corporation was to manufacture and sell woollen and

other goods, and the places of business were Nashua in New Hampshire, and East Brookfield in Massachusetts.

The defendant further testified that, subsequently to the execution of the agreement of association, one or more meetings were held by the signers, at which he was elected president and treasurer of the corporation, and such other officers and directors were elected as were necessary under the laws of New Hampshire; that the attorney had been recommended to him as a reputable and reliable man and attorney, and he left everything in his hands, and supposed he did everything necessary and proper to establish the corporation in a legal manner; that records of the meetings were kept by the attorney, and that there was a stock-book and certificates of stock were issued; that all the stock was issued to the defendant, and that no other person was interested in it; that fifty per cent of the capital stock of the corporation was actually paid in by him in cash and supplies; that after the organization of the corporation he hired, as treasurer of the corporation, a mill in East Brookfield belonging to his mother, Roxanna Forbes, and himself, and began the manufacture of woollen goods; that he purchased the necessary supplies, including those named in the plaintiff's account, and placed them under the direction of a superintendent, employed to supervise the manufacture of the goods; that there was no manufacturing done in Nashua, nor any other business except the holding of corporate meetings, and possibly the sale now and then of a bill of goods in the ordinary course of business; and that the principal place of business of the corporation was in East Brookfield; that he, as president and treasurer of the corporation, continued to manufacture woollen goods for about four months, and sent the goods to commission houses in New York to be sold; and that at the end of said four months he was unable to continue the business and gave it up, and no further business was done by him or by the corporation.

The following sections of chapter 152 of the General Laws of New Hampshire of 1878, were introduced in evidence:

"Sect. 1. Any five or more persons of lawful age may, by written articles of agreement, associate together, for agricultural, educational, or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the Secretary of State, they shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sect. 2. The object for which the corporation is established, the place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

Upon this evidence, the defendant asked the judge to rule that the plaintiffs were not entitled to recover, that the account in question had been paid by the notes of the Forbes Woolen Mills as a corporation, and that there was no evidence to authorize the jury to find for the plaintiffs.

The judge declined so to rule, and submitted the following questions to the jury: "1st. Did the Forbes Woolen Mills and the members of said alleged corporation, including said Forbes, at the time of its attempted organization, intend to carry on its business as a manufacturing corporation (other than holding meetings of its members and officers) in whole or in part in the city of Nashua, New Hampshire? 2d. Was there an attempt in good faith on the part of the defendant, Forbes, to organize the corporation of the Forbes Woolen Mills? 3d. Did said Forbes, at and prior to the time the goods in controversy were ordered, namely, at all times after May 12, 1885, during his dealings with the plaintiff, believe that the organization of said Forbes Woolen Mills was a valid corporation?"

The jury answered the first two questions in the negative, and the third in the affirmative.

The judge, being of the opinion that, upon the findings of the jury and the uncontradicted evidence in the case, the plaintiffs were entitled to recover, directed the jury to return a verdict for the plaintiffs, and reported the case for the determination of this court.

*W. B. Harding & H. F. Harris*, for the plaintiffs.

*B. W. Potter & M. M. Taylor*, for the defendant.

C. ALLEN, J. The apparent corporation was not a corporation. The statute of New Hampshire requires five associates, and the articles of agreement must be recorded in the town in which the principal business is to be carried on, and the place in which the business is to be carried on must be distinctly stated in the articles; otherwise there is no corporation. The defendant's pretended associates were associates only in name; he alone was interested in the enterprise. The articles of agreement were recorded in Nashua, and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. The defendant took all the shares of the capital stock, and paid in to himself as treasurer only fifty per cent of the amount thereof. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name. *Fuller v. Hooper*, 3 Gray, 334, 341. *Bryant v. Eastman*, 7 Cush. 111.

The jury found that he did not in good faith attempt to organize the corporation, but that he believed it to be a valid corporation. His

belief, in view of the facts of the case, is immaterial. Under this state of things, the defendant bought goods of the plaintiffs for his own sole benefit, adopting the name of the apparent corporation, which had no real existence, and which represented nobody but himself. He cannot escape responsibility for his purchases by the device of putting such a mere name between himself and the plaintiffs. The purchase was in substance by and for himself alone. The plaintiffs might have repudiated the transaction, and maintained replevin, if they had learned the facts in time. They may also treat the transaction as a sale to the defendant personally. *Fay v. Noble*, 7 Cush. 188, 194. *Kelner v. Baxter*, L. R. 2 C. P. 174, 183, 185. 2 Kent Com. (13th ed.) 630.

Since the notes represented nothing, the plaintiffs were at liberty to treat them as void, and recover on the original contract for goods sold. *Melledge v. Boston Iron Co.* 5 Cush. 158, 171.

*Verdict to stand.*

## INDIANAPOLIS FURNACE CO. v. HERKIMER.

1873. 46 *Indiana*, 142.<sup>1</sup>

FROM the Marion Circuit Court.

*Hendricks, Hord & Hendricks* and *Test, Burns & Wright*, for appellant.

*J. E. McDonald* and *J. M. Butler*, for appellee.

WORDEN, J. Complaint by the appellant against the appellee on the following paper subscribed by the defendant.

“Articles of association of the Indianapolis Furnace and Mining Company, organized for the purpose of operating in the counties of Marion and Clay, in the State of Indiana.

“Article First. The name of said company shall be the Indianapolis Furnace and Mining Company.

“Article Second. The capital stock of said company shall be one hundred thousand dollars, and be divided into shares of fifty dollars each, to be paid for in such amounts and at such times as may be ordered by the board of directors.

“Article Third. The stockholders shall elect directors, who shall from their number elect a president, secretary, and treasurer, who shall hold their office for one year and until their successors are elected and qualified.

“Article Fourth. The board of directors shall have the control and management of the business of the company, except as they may appoint some one or more persons to take charge of the same, in which case the record of the action of the board in appointing them shall be evidence of their authority to act for said company.

“Article Fifth. The board of directors shall have power to make

<sup>1</sup> Only part of the opinion is given. — Ed.

assessments on stock, collect the same, issue certificates therefor, and declare and pay dividends, which shall be at least twice a year.

"Article Sixth. All the expense incurred by the company shall be paid, and all the indebtedness of the same shall likewise be discharged before any dividends shall be paid to the stockholders, unless the directors shall direct otherwise.

"Article Seventh. We, the undersigned, hereby subscribe to all the foregoing articles, provisions, conditions, and stipulations, and agree to the organization of a company as therein stated, binding ourselves to take and pay for the number of shares of stock set opposite our names respectively, and pay for the same at such times and in such amounts as the board of directors may order the same to be paid for, without relief from valuation or appraisal laws.

"Subscribers' Names.

No. of Shares.

"J. D. Herkimer, by D. Root,

100."

There were three paragraphs in the complaint, each counting upon the same instrument, in each of which it was alleged that at the time of the execution of the instrument by the defendant, the plaintiff was a duly organized corporation; but it is not alleged in either paragraph that after the execution of the instrument any steps were taken to perfect the organization.

The defendant demurred to each paragraph, assigning for cause the want of a statement of sufficient facts, but the demurrers were overruled, and the defendant excepted.

The defendant then answered,

1. By general denial.

2. *Nul tiel corporation.*

3. *Nul tiel corporation*, setting out specially the omission of the performance of the acts required by the statute, in order to perfect the corporate organization.

4. A denial of the execution of the instrument, sworn to.

Trial by the court, finding and judgment for the defendant, the plaintiff having unsuccessfully moved for a new trial.

We may properly here notice another proposition, which, though not perhaps directly involved, is in some measure connected with the motion for a new trial. We are of opinion that a radical error was committed in overruling the demurrers to the several paragraphs of the complaint. The articles of association signed by the defendant, including his subscription for stock, were very clearly mere preliminary articles, contemplating a future perfection of the organization as a corporation. The defendant's contract did not purport to be with an existing corporation, but with one to be brought into existence in the future. The averment in the complaint that the plaintiff was, at the time the subscription was made, an existing corporation, cannot change the nature and legal effect of the defendant's contract. That contract was, in legal effect, that the defendant would take and pay for the

stock subscribed for, in case the organization should be perfected and the corporation brought into legal existence, and not otherwise. Such preliminary subscriptions seem to enure to the benefit of the corporation when formed. *Heaston v. The Cincinnati, etc., Railroad Co., supra.*

But unless the subsequent steps, necessary to bring into existence the corporation, were taken, there was no corporation to whose benefit the contract could enure, and the defendant could not be liable; and it should have been averred in the complaint that such steps had been taken. *Wert v. The Crawfordsville and Alamo Turnpike Co.*, 19 Ind. 242; *Williams v. The Franklin Township Academical Association*, 26 Ind. 310.

In such case, the estoppel growing out of a contract with a party as an existing corporation does not apply. In the case last cited, the court say:

“This rule of estoppel does not apply to a suit brought on a subscription made with a view to the organization of a corporation, and as preliminary thereto; where other acts are required by the law as a condition precedent to the exercise of corporate powers.”

[The court then held, that, under the statute, it was an indispensable prerequisite to the legal existence of the corporation that a certificate should be filed in the office of the Secretary of State, which was not done in the present case.]

Now, although the complaint was held good, the pleas of *nul tiel corporation* put in issue the existence of the corporation; and we think, under the issues, the plaintiff was bound to prove such existence by showing a compliance with the statutory requisites. The burthen was on the plaintiff, because the defendant was not estopped by his contract to dispute the existence of the corporation, and because the perfection of the organization was a condition precedent to the plaintiff's right to recover.

We now proceed to consider the ground, upon which it is claimed that a new trial should have been granted. There were six reasons assigned for a new trial. [One reason was, the refusal of the court to hear the testimony of Horace W. Hibbard, to the effect that the defendant told him that he had five thousand dollars of the stock of said company, and offered to trade the same to him. As to this Worden, J., said]: The evidence of Hibbard was properly rejected, because such recognition by the defendant of the existence of the corporation could not estop him to controvert the fact; nor could it supply the omission of an act which the law requires to be performed before the corporation can be called into being.

*Judgment below affirmed.*

#### 1874. ON PETITION FOR A REHEARING.

WORDEN, C. J. The appellant has filed a petition for a rehearing in this case, claiming, as we understand the argument, that as it was shown

by averment and proof, that the defendant's contract was made with an existing corporation, it should be treated as such; and therefore it was unnecessary for the plaintiff to show that the proper steps had been taken to perfect the organization of the corporation.

In the original opinion, we set out in full the contract entered into by the defendant. That contract very clearly was not with an existing corporation. It contemplated a future organization of the corporation, to which he was to become liable on his subscription. To treat him as having promised to pay the amount of his subscription to a corporation which then existed, would be to make a new contract for him in place of the one which he made for himself. There may have been a corporation of the same name, and organized for the same purpose, in existence at the time the defendant made his contract; but if so, the contract set out was not made with such existing corporation. That contract was to pay a corporation to be thereafter organized and brought into existence. The ground upon which a party who has contracted with a corporation as such is estopped to deny its existence, is, that by his contract he has recognized the existence of the corporation.

The contract in question, instead of purporting to be made with an existing corporation, utterly excludes the idea of its present existence, but contemplates the future organization of the corporation, to which he was to pay the amount of his subscription.

The legal effect of a written contract cannot be thus changed by averment or parol evidence.

The petition for a rehearing is overruled.

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JOHNSON v. CORSER ET ALs.

1885. 34 *Minnesota*, 355.

ON April 30, 1884, the defendants signed articles associating themselves together for the purpose of organizing as a body corporate under the name of "The Sixth Avenue North Extension and Improvement Association." These articles of association were not filed for record until November 21, 1884. In the first week in May, 1884, by-laws were adopted and officers were elected. On June 16, 1884, a contract in writing, in the name of the association, was made with Egan & Salter for grading and improving Sixth Avenue. Work was begun under this contract, and continued till August 5, 1884, when the plaintiff and others, laborers engaged upon the work, struck and refused to continue work, because they had not received their pay. Two of the defendants, the secretary and vice-president of the association, visited the scene of work and succeeded in inducing plaintiff and his fellow-laborers to return to work, upon the promise, as claimed by



plaintiff but denied by defendants, that the association would pay them. Thereafter the plaintiff continued work till November 18, 1884, and the officers of the association paid them to October 1, 1884.

The plaintiff brought this action before a justice of the peace for Hennepin county against the defendants, as partners, to recover for his work and services from October 1, 1884, to November 18, 1884. Upon appeal to the district court, the action was tried before *Young, J.*, and a jury, and plaintiff had a verdict. Defendants appeal from an order refusing a new trial.

*Rea, Kitchel & Shaw*, and *Scott, Longbrake & Van Cleve*, for appellants.

*Thomas Canty* and *Robert Christensen*, for respondent.

DICKINSON, J.<sup>1</sup> In the spring of 1884 the defendants entered into articles of association, intending to acquire a corporate character, and probably supposed that this purpose had been accomplished. No incorporation was, however, effected. The articles of association executed by the defendants declared the purpose of the proposed corporation to be to secure the extension of a certain street in Minneapolis, and to improve and beautify the same. They provided for no capital stock, but that the funds necessary for the accomplishment of the contemplated purpose should be raised by subscription from the members. The usual officers were named, and a board of five directors provided for; meetings of the members were held; officers and a board of directors elected; by-laws adopted, which provided for the appointment of an executive committee, whose duty was declared to be to direct and superintend the work and to employ the necessary labor; subscriptions were made by all of the defendants, excepting Stark, for the purposes of the association; a contract was made between the association, by its adopted name, and certain contractors, (*Egan & Salter*), for grading and improving the street, and the performance of the work under the contract was entered upon. The plaintiff was an employé of *Egan & Salter*, and engaged, with others, in the work. During the progress of the work, the employés of the contractors, becoming dissatisfied with their employers, ceased to work. Then two of the defendants, *Mathews* and *Riebeth*, who were respectively vice-president and secretary of the association, made an agreement with the laborers, the precise nature of which is in dispute. The evidence on the part of the plaintiff is sufficient to support what must have been the conclusion of the jury, that the agreement was that if the men would go on with the work, the association would pay them; while the evidence for the defendants tended to show that the agreement was merely to pay directly to the laborers the money which should be due to *Egan and Salter* on their contract. By this action the plaintiff seeks to recover against the defendants individually upon this agreement.

The attempt to become incorporated was ineffectual to limit the indi-

<sup>1</sup> *Mitchell, J.*, did not hear the argument and took no part in this case.

vidual liability of the associates; and upon any contract which they may be found to have authorized to be made, or which they may have ratified, although in terms the contract was made as the contract of the association or assumed corporation, the members may be held to an individual responsibility. *Hess v. Werts*, 4 Serg. & R. 356; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Ill. 197; *Garnett v. Richardson*, 35 Ark. 144; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Field v. Cooks*, 16 La. Ann. 153; *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260. While, if the other contracting party were to charge the defendants in their assumed corporate capacity, they might not in some cases be heard to deny their corporate existence, yet, there being in fact no such existence, the plaintiff may go behind the assumed corporate character, and hold the real principals to responsibility for the acts of those whom they may have clothed with authority to act in behalf of the association. *Bigelow v. Gregory*, *supra*; *Kaiser v. Lawrence Sav. Bank*, *supra*; *Jessup v. Carnegie*, *supra*; *Hurt v. Salisbury*, 55 Mo. 310.

We deem the evidence to have been sufficient to sustain a conclusion on the part of the jury that all of the defendants, the members of the association, authorized the prosecution of the contemplated work, and knew that it was actually being carried forward under the direction of the appointed agents of the association; that the executive committee was authorized by the association to prosecute the work as its agent, and for that purpose to employ laborers; that the alleged contract upon which this action is brought was made by two members of the committee in behalf of the association; and that the whole committee, having knowledge of that fact, ratified the agreement, making payments from time to time in accordance with it. Only as to two of these particulars does the sufficiency of the evidence seem questionable, and only to that evidence shall we particularly refer.

It is in evidence that the defendant Stark did not subscribe or pay anything for the purpose of the association, and, after executing the articles of association, took no active part in the enterprise. He, however, subscribed to the articles of association, the declared purpose of which was the prosecution of this work. He was present on the occasion when the agreement sued on was made, and, as the evidence tends to show, heard the agreement then made, — that the association would pay the laborers, — although, according to his own testimony, the agreement was not such as is shown on the part of the plaintiff. We think this sufficient to warrant the conclusion that Stark was aware that the work was being carried on in behalf of the association with which he had united, and that Mathews and Riebeth in his presence assumed to make this contract as the contract of the association. If the fact were so, the mere silence of Stark might be deemed to signify his acquiescence.

It is not entirely clear from the evidence whether the agreement made by Mathews and Riebeth was communicated to all the other

members of the executive committee. The by-laws adopted by the association declared that there should be an executive committee of five, of which the president, vice-president, and secretary should be *ex officio* members, and of which three members should constitute a quorum. But it is testified to that *five* members of the executive committee were elected. We are left in doubt whether the association in fact named three or five of its members, in addition to the *ex officio* members, as its executive committee. But this is not very material. It is distinctly testified to that the agreement made by two of the *ex officio* members of the committee was communicated to three of the other members of the committee, one of whom was the president, and that they assented to it. It further appears that other members named as members of that committee were present when computations were made of the amounts to be paid to the laborers; that meetings of the committee were held, at which they took action relative to the work being carried forward under the agreement made by Mathews and Riebeth; and that during a period of several weeks the laborers were paid by direction of the committee. While this evidence is not the most satisfactory, it is still such as to justify the conclusion that the agreement, as testified to on the part of the plaintiffs, was communicated to the executive committee as a whole, and was ratified and adopted by them. Nothing further was necessary to charge the defendants with liability.

The plaintiff asserts, as a rule of law applicable to the case, that, from the mere failure to perfect the contemplated incorporation, the association, after proceeding to carry on the proposed enterprise, became a partnership, and the members copartners, with authority (implied from their relations) in each member to bind all of the associates by any act within the scope of the business carried on by the association. We cannot sanction the application to this case of the doctrine of implied agency as it is recognized in ordinary business copartnerships. If it be conceded that the principle upon which the plaintiff relies exists and is applicable in cases where the business contemplated and carried on by the association, and the purposes for which it is prosecuted, are such as involve the essential elements of a partnership undertaking, or where the articles of association contain all that is essential to create a partnership, — still the principle is not applicable to this case, in which those conditions do not exist. So far as appears, the business undertaken and carried on by the defendants was not of a partnership character, nor the purposes such as to suggest the relation of copartners between those engaged in it. It was only the grading of a public street by the co-operation of these several persons, and that, so far as appears, for no purpose of gain or profit. This would not have constituted those uniting and contributing for such a purpose copartners; nor can such a result have been accomplished by the further fact that an incorporation was contemplated, and attempted to be perfected, but failed. We deem the liability of the

defendants to rest upon the ordinary principles of contract and agency, and not upon the ground of an existing copartnership.

The articles of association executed by the defendants were properly received in evidence. This evidence went to show the co-operation of the defendants in the enterprise in carrying on which the contract sued on was made. The same is true of the proof of contributions of money from the defendants.

Order affirmed.

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### SNIDER'S SONS CO. v. TROY.

1890. 91 *Alabama*, 224.<sup>1</sup>

ACTION for goods sold by plaintiffs, in 1888, to, or on the order of, The Dispatch Publishing Co. The complaint alleged that said Company was at the time a partnership, and that defendant was one of the partners; that the Company claimed to be a corporation, but was never in fact incorporated. Plea, setting out certain steps taken, in 1885, by defendant and other persons to organize a corporation by the above name; also alleging that the debt now sued for was contracted by said Company as such corporation, and not otherwise; and that plaintiff dealt with it as a corporation, and not as a partnership or association of individuals. A demurrer to the plea was overruled.

*E. P. Morrissett*, for appellant.

*Tompkins & Troy*, contra.

CLOPTON, J. A corporation *de facto* exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and with the powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises and functions. *M. E. Church v. Pickett*, 19 N. Y. 482; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. Rep. 362.

The enabling law under which a corporation for the purposes and objects of the Dispatch Publishing Company, and with the powers assumed, might have been lawfully created at that time, is contained in sections 1803-1812 of the Code of 1876, and the amendatory acts, which authorize and provide for the incorporation of two or more persons desirous of forming a private corporation for the purpose of carrying on any industrial or other lawful business not otherwise specially provided for by law. Acts 1882-83, p. 40. The plea avers that defendant and two other named persons filed, September 2, 1885, with

<sup>1</sup> Statement abridged. Arguments omitted. — ED.

the judge of probate of Montgomery county, a written declaration, signed by themselves, setting forth substantially the matters required by the statute, except the residences of the persons, that they organized by the election of three directors, and commenced and continued to do business in a corporate capacity, and were so doing business when the debt sued for was contracted. If the averments of the plea be true, the truth of which is admitted by the demurrer, the Dispatch Publishing Company was an association having capital stock divided into shares, organized by the election of officers, and transacting business, and exercising franchises, functions, and powers, after an attempted incorporation, as if it were a corporation *de jure*, a colorable compliance with the requirements of an existing and enabling law, and user of the rights claimed to be conferred thereby, the essential elements of a corporation *de facto*. *Central, A. & M. Ass'n v. Alabama G. L. Ins. Co.*, 70 Ala. 120.

Appellant seeks by the action to hold defendant, who was a member, liable as a partner for paper and other supplies sold to the Dispatch Publishing Company. Whether the shareholders in a corporation *de facto* are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In *Cook, Stocks*, § 233, the doctrine asserted is: "A corporate creditor, seeking to enforce the payment of his debt, may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question." The leading cases supporting this doctrine are *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Smelting Co.*, 4 Neb. 416; *Garnett v. Richardson*, 35 Ark. 144; *Ferris v. Thaw*, 72 Mo. 446; *Ridenour v. Mayo*, 40 Ohio St. 9; *Coleman v. Coleman*, 78 Ind. 344. We have omitted reference to a few cases, sometimes cited, for the reason, that either the question of liability as partners was not before the court, as in *Blanchard v. Kaull*, 44 Cal. 440; or the debt was contracted before any steps were taken, other than the mere filing of a certificate, towards organization, as in *Bergen v. Fishing Co.*, (N. J.) 3 Atl. Rep. 404; or it was contracted after the expiration of the charter by its own limitation without reorganization, as in *Bank v. Landon*, 45 N. Y. 410. In the case last cited, the shareholders entered into a special agreement, which by its terms created a partnership as to third persons. In 2 *Mor. Priv. Corp.* § 748, the doctrine is stated as follows: "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members cannot be charged as parties to the contract, either severally or jointly or as partners." The following cases maintain the doctrine that the members of a corporation *de facto* cannot be held liable as partners for the corporate debts. *Fay v. Noble*, 7 Cush. 188; *Bank v. Almy*, 117 Mass. 476; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. Rep. 362; *Bank v. Padgett*,

69 Ga. 164; Bank v. Stone, 38 Mich. 779; Humphreys v. Mooney, 5 Colo. 282; Bank v. Walker, 66 N. Y. 424; Coal Co. v. Maxwell, 22 Fed. Rep. 197; Whitney v. Wyman, 101 U. S. 392.

The plea and demurrer do not raise the question of the liability of the supposed stockholders, as partners, where there has been no intention or attempt to incorporate, where they are acting as a body corporate without even color of legislative authority, by sheer usurpation. The plea avers that the debt sued for was contracted by the Dispatch Publishing Company, which is alleged to have been a *de facto* corporation, and that plaintiff sold the goods to, and contracted with, the company as a corporation, knowing that it was doing business as such. The question before us, and the only question we propose to decide, is whether, there being no fraud alleged, nor statute making the stockholders individually liable, a creditor, who has dealt with a *de facto* corporation as a corporation, who has entered into contractual relations with it in its corporate name and capacity, can disregard the existence of the corporation, and, electing to treat it as a partnership, enforce the collection of his debt from the stockholders individually? The conflicting authorities afford aid in the solution of this question, only so far as their opinions may be in accord with settled principles and sustained by reason. Though it is an undecided question in this state, principles have been well settled which materially bear upon the inquiry, and mark the way to a correct conclusion.

Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles, as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, and who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in *Lehman v. Warner*, 61 Ala. 455, in the following language: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state—the sovereign—whose rights are invaded and whose authority is usurped. The individual could not create the corporation, could not grant, define, limit its powers, and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether corporate existence is rightful *de jure*, or merely colorable." *Taylor, Corp.* § 145; 4 Amer. & Eng. Enc. Law, 198. The creditor cannot proceed against the stockholders as partners, without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality, of its existence.

It is also an established rule of general application, that a party who contracts with a corporation, exercising corporate powers and performing corporate functions, existing as a *de facto* corporation, in its corporate name and capacity, will not be permitted in a suit on the contract to deny and disprove the rightfulness of its existence. 4 Amer. & Eng. Enc. Law, 198. In *Swartwout v. Railroad Co.*, 24 Mich. 390, COOLEY, J., declares the rule as follows: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."

The general rule is thus stated by BRICKELL, C. J.: "Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." *Cahall v. Association*, 61 Ala. 232; *Central A. & M. Ass'n v. Alabama G. L. Ins. Co.*, 70 Ala. 120; *Schloss v. Trade Co.*, 87 Ala. 411, 6 South. Rep. 360.

It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation, or persons who have contracted with it, where the stockholder, or corporation, or person, is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? Why should the stockholder be estopped in a suit by a creditor of an insolvent corporation to require payment of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation, and proceed against the stockholder as a partner? Why should not the estoppel be mutual? Taylor, in his work on Corporations, § 148, having stated the general rule, that a corporation, when sued on its contract, and the person who contracted with it, when sued on his contract, is estopped to deny its legal incorporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as partners." And the same rule was applied in several of the cases cited above, in which a corporate creditor was seeking to hold the stockholder liable as a partner for a corporate debt. The abrogation of the foregoing well-established rule is the logical sequence of maintaining a suit by a creditor of a *de facto* corporation, charging the stockholders as partners.

Another consideration. Section 8, art. 14, of the constitution, de-

clares: "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Exemption from liability other than for unpaid stock is the declared policy of the state. It cannot be imposed by legislation or by the judgment of a court. In view of the constitutional provision it is manifest that the shareholders of the Dispatch Publishing Company intended, by the attempt to incorporate, to avoid individual liability for the debts contracted by the corporation. When a party deals and contracts with a corporation as corporators, exemption from individual liability enters as an element of the contract. It is true that the liability of persons associated in an enterprise or adventure is not determinable by the name they may assume, but by the legal consequences of their acts. A partnership may arise as to third persons by mere operation of law, and contrary to the intention of the parties, but, to have the effect, the elements essential to constitute a partnership as to third persons must exist. A corporation *de facto* has an independent *status*, recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation. As said in *Fay v. Noble*, *supra*: "Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a *de facto* corporation as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract; changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract; effects the imposition of an enlarged liability, which they did not assume, but intended to avoid, so understood by the creditor when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle, that the corporation and the shareholder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the contract. He repudiates the party, the corporation, with which he made the contract, and seeks its enforcement against parties who never entered into contractual relation with him. The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning consistent with well-settled principles, and in harmony with the policy of the state. Affirmed.



## RUTHERFORD v. HILL.

1892. 22 *Oregon*, 218.

MULTNOMAH county: E. D. SHATTUCK, Judge.

Defendants appeal. Reversed.

The defendants are sued as partners under the name and style of the Himes Printing Company. The complaint does not anywhere allege that the defendants entered into an agreement of co-partnership, but in lieu thereof the following facts are alleged: "That the defendants, on or about the fifth day of September, 1890, executed, acknowledged, and filed in the office of the clerk of the county court of Multnomah county, and in the office of the secretary of state at Salem, Oregon, certain articles of incorporation as the Himes Printing Company; that the defendants, in violation of the laws for the formation of corporations subsisting in the state of Oregon, negligently failed to provide a stock-book and to secure stock subscriptions to said corporation; that in spite of their said violation of the law, the defendants undertook to carry on the business provided for in said articles of incorporation, appointed one George H. Himes superintendent of their said business, and authorized him and the defendant Sherman Martin to represent them in all the transactions of said business; that said business was carried on under the firm name and title of the Himes Printing Company; that between May 1, and September 1, 1891, the plaintiff, at the instance and request of the defendants, through their agents, the aforesaid Himes and the defendant Martin, performed certain labor and services for the defendants, of the reasonable and agreed value of two hundred and thirteen dollars and fourteen cents, which sum the defendants promised to pay; that the plaintiffs performed the aforesaid work, relying on the credit and representations of the defendants for their payment."

Earhart and Hill answered separately, and each of them denied every material allegation of the complaint, except they did not deny executing and filing the articles of incorporation of the Himes Printing Company.

The jury returned a verdict against the defendants Earhart and Hill for the amount claimed, and a judgment was entered thereon, from which this appeal was taken.

*George H. Durham*, and *J. F. Watson*, for Appellants.

*Wallace M. Cammant*, for Respondents.

STRAHAN, C. J. — At the conclusion of the evidence, the defendants Hill and Earhart asked the court to instruct the jury as follows: "1. The execution and filing of the articles of incorporation of the Himes Printing Company by said Hill and Earhart, in connection with the defendant Sherman Martin, would not itself make them partners with Martin, or render them liable in this action. 2. Said defendants

Hill and Earhart cannot be charged in this action unless it has been shown by a preponderance of the evidence that they had notice of their being held out as such partners, and plaintiffs also had notice thereof before or at the time they performed the labor and services alleged in the complaint and performed the same on the faith thereof. 3. The plaintiffs cannot recover in this action against Hill and Earhart, unless it has been proved by a preponderance of the evidence that said Hill and Earhart were partners in said printing company at the time the contract for said labor and services was entered into, or at the time the same were performed, or at the time the contract was entered into, or said labor and services performed, undertook to carry on said business of said company, or were interested as partners or appointed or participated in the appointment of George H. Himes as superintendent of said business, or authorized him or said Martin to represent them in the transaction of said business, or requested through said Himes or Martin the plaintiffs to perform said labor and service." No. 4 was in effect a direction to the jury to return a verdict for the defendants Hill and Earhart. The defendants excepted to the rulings of the court in refusing to give each of the foregoing instructions.

The court then instructed the jury as follows: "I cannot agree with you, Mr. Durham and Judge Watson, that there may not be some other reasons why parties should not be bound than such as usually arise from an estoppel. Since this case has been going on, it has occurred to me whether or not this may not furnish a class of itself for pronouncing a man to be a partner. As a general rule, the doctrine of estoppel has got to be made out according to the authorities you have read; but I am inclined to the opinion that the mere act of filing articles is itself a holding out and notice to the world that they are associated in the business that is carried on under the name. I do not feel very certain about it, but my best conception of this matter is that it ought to be considered the rule." An exception to this instruction was duly noted. The court also gave the following instruction: "If you find from the evidence in this case that these two defendants and Sherman Martin filed articles of incorporation for the purpose of carrying on the printing business under the name of the Himes Printing Company, and that thereafter one of these men, to-wit, Sherman Martin, took up the business contemplated by this corporation, and carried it on under that name, and incurred liabilities, then all these incorporators that signed the articles are liable, and your verdict should be for the plaintiffs for the amount claimed, provided you further find that, before they performed the labor and rendered the services, they ascertained the fact of these articles being filed, and acted on the faith of the association of these defendants with Sherman Martin, and that they were induced thereby to perform the labor and render the services." An exception was also taken to this instruction.

There was no evidence whatever before the jury that these defendants had anything to do with the business of the Himes Printing Com-

pany, or in any way authorized the same, except to sign the articles of incorporation. They appointed no agents and employed no laborers, purchased no material, nor did they have any knowledge that any business was conducted under that name, except the company did some printing for the defendant Hill; and when a bill was presented to him for the same it had at the top, printed in bold letters, "The Himes Printing Company, incorporated; Geo. H. Himes, Superintendent; Sherman Martin, Manager." There was no evidence before the jury that the plaintiffs had any actual knowledge of the filing of the articles of incorporation at the time they performed the services sued for.

The sole question, therefore, seems to be whether or not, where three or more persons sign, acknowledge, and file articles of incorporation under the laws of this state, and do nothing further towards effecting an organization or carrying on the proposed business, and one of them assumes to do business under the proposed corporate name and incurs liabilities, the other persons who sign said articles are liable. Appellants maintain that in such case there is no liability on the part of those who do not participate in the business either directly or indirectly, while the respondents seek to maintain the reverse of this proposition; and this contention presents the only question we need consider on this appeal.

The respondent contends that the executing and filing of the articles of incorporation and the assumption of the corporate name by one of the parties under which he does business, create a partnership between all the persons signing said articles; and to sustain this view he relies upon these authorities: *Whipple v. Parker*, 29 Mich. 369; *Jessup v. Carnegie*, 44 N. Y. Sup. Ct. 260; *Coleman v. Coleman*, 78 Ind. 344; *Pettis v. Atkins*, 60 Ill. 454; *Smith v. Warder*, 86 Mo. 382; *Garnett v. Richardson*, 35 Ark. 144; *Lind. Part. 5*; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Johnson v. Corser*, 34 Minn. 355. Some other authorities similar to these in principle, might be cited, but they add nothing to this side of the question. Without stopping to distinguish these cases from the one now before us, we think the decided weight of authority, as well as the better reason, is the other way. *Fay v. Noble*, 7 Cush. 188, is an early case in which it was held that the subscribers for and holders of stock in a manufacturing corporation, which has been defectively organized and transacted business under such defective organization, do not thereby become partners, general or special, in such business. In *Trowbridge v. Scudder*, 11 Cush. 83, it was held that the stockholders of a corporation do not become liable as partners on notes given by the treasurer of the corporation, merely because after organizing they transacted no business. In *First Nat. Bank v. Almy*, 117 Mass. 476, it was held that the members of a corporation were not liable as partners by reason of having transacted business before the whole capital stock was paid in as required by statute. In *Humphreys v. Mooney*, 5 Col. 282, in considering the question now before the court, it was said: "The doctrine of a part-

nership liability in such case is not founded in law reason, and is repugnant to the very purposes of the statute authorizing a corporation, one object of which is to limit individual liability." Substantially, the same doctrine is announced in *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Planters' etc. Bank v. Padgett*, 69 Ga. 159; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Ward v. Brigham*, 127 Mass. 24; *Central etc. Bank v. Walker*, 66 N. Y. 424; *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643; *Blanchard v. Knoll*, 44 Cal. 440; *Morawetz Corp.* § 748. And 17 Am. & Eng. Ency. Law, 866, after stating that the rule contended for by respondents had been adopted by quite a large number of cases, remarks: "But the weight of authority perhaps sustains the contrary rule, that if they were acting under the supposition that they were incorporated, and were assuming only the liability of stockholders, and not that of partners, they will not be held liable as such"; and a long list of cases is cited to sustain this proposition.

It is not doubted that cases might arise and can readily be imagined where the incorporators sought to be charged might take such part in conducting the business, or hold themselves out to the world as partners or as principals in the business, that they would be held liable; but this would grow out of their conduct in carrying on the business, and not out of the mere fact of signing and filing the articles. If the appellants could be held liable in this case, such liability would rest on the mere act of signing and filing the articles, and not upon any participation in the business, either directly or indirectly. It would have to rest upon the theory, that by the mere signing the articles with Martin, they constituted him their general agent to proceed to conduct the business contemplated by the proposed corporation, thus creating a liability for any act of his done within the scope of the powers of the proposed corporation.

No authority to which our attention has been directed, has gone so far, and we feel safe in saying that none can be found to support that doctrine. We therefore reverse the judgment, and remand the cause for such further proceedings as are not inconsistent with this opinion.

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## BUSHNELL v. CONSOLIDATED ICE MACHINE CO.

1891. 138 *Illinois*, 67.<sup>1</sup>

WILKIN, J. This was a proceeding in chancery, by plaintiff in error, against defendants in error, begun in the circuit court of Cook county on the 27th day of October, A. D. 1889, the object of which was to

<sup>1</sup> Arguments omitted. — Ed.

have the Consolidated Ice Machine Company declared a co-partnership, and its affairs settled between the complainant and defendants accordingly. In the circuit court a general demurrer was sustained to the bill, and a decree entered dismissing the same at complainant's costs. From that decree this writ of error is prosecuted.

The following facts affirmatively appear from the bill: Early in September, in 1884, complainant and the defendants, Skinkle, Rassieur and Koenigsberg, together with one Edmund Jungfeld, since deceased, entered into an agreement, in writing, to form a corporation to be known as the "Consolidated Ice Machine Company," under the laws of this State; that all the required steps up to and including the issuing of a certificate of the complete organization of such corporation by the Secretary of State, as required by section 4, chapter 32, of the Revised Statutes, were taken; that in pursuance of that certificate, complainant, with said Skinkle, Rassieur and Jungfeld, claiming to be the directors of said company, elected officers for the same, "and immediately engaged in business." It also appears from the bill, that said company continued to do business under said name to the filing of this bill, a period of more than five years. Also, that for several months complainant continued to be the secretary and soliciting agent for the same, and was actively engaged in its business; that about January 1, 1885, he became afflicted with *melancholia*, and remained incapacitated for the transaction of business for about three years; that during his said sickness the other directors of said company sold certain shares of his stock in said company for a failure on his part to pay installments due thereon, the sale being made without notice, etc., and that since said sale he has been excluded from all participation in the management of said business; that after being restored to health, and before filing his bill, he made frequent demands to be restored to his rights in said corporation, without avail, etc. Facts are then alleged which go to the basis of a settlement between the parties upon the theory that they are liable to each other as partners. In our view of the case these facts are unimportant.

It is also insisted in the argument, that the bill shows that by the terms of the agreement to organize said company the same was only to exist for a period of five years, which had expired when the bill was filed. The license under which the organization was made is attached to the bill as an exhibit, and it states that its duration shall be twenty-five years. If it were important to determine the lifetime of the company, we have no doubt that this license, and not the preliminary agreement of the parties, would control. This, however, is not a question of importance in this proceeding. For the mere exercise of its franchise beyond the period for which it was organized, the State alone could complain.

It is also contended that certain subscriptions to the capital stock made by complainant are shown by the bill not to be subscriptions made in good faith, and that the directors having assumed corpo-

rate powers before all the stock was subscribed for in good faith, became personally liable for all debts and liabilities of the company, under section 18, chapter 32, of the Revised Statutes. We think it clear that complainant is in no position to raise that question in a court of equity for the purpose of having the company declared a co-partnership.

The only allegation of the bill which is seriously insisted upon as furnishing a ground for the relief prayed is, "that the certificate of complete organization was never recorded in the office of the recorder of deeds for Cook county, where its principal office is located," the argument being, that in order to constitute the defendant company a corporation under the laws of this State that certificate must have been so recorded, and failing to become incorporated, its members are to be treated as partners. The section of the statute upon which the first proposition is based is as follows: "The Secretary of State shall thereupon issue a certificate of the complete organization of the corporation, making part thereof a copy of all papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of State, and the same shall be recorded in a book for that purpose in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of said copy the corporation shall be deemed fully organized, and may proceed to business. Unless such company shall be organized, and shall proceed to business, as provided in this act, within two years after the date of such license, then such license shall be deemed revoked and all proceedings thereunder void." The language of this section is not clear. While it says the *certificate* shall be recorded, it does not say who shall cause it to be done. It does not say the recording of the *certificate* shall be necessary to the complete organization of a corporation, but "upon the recording of the *said copy* the corporation shall be deemed fully organized, and may proceed to business." Conceding, however, by the word "copy" is meant "certificate," incorporators would have done all that is required of them when they had filed it with the proper officer for record. There is no allegation in this bill that it was not so filed. The averment is simply that it has "never been recorded," etc.

But assuming that a corporate existence *de jure* depends upon the filing of the certificate of complete organization in the office of the recorder of deeds of the county in which its principal office is located, and that the bill properly avers that it was not done in the case of the corporation in question, it by no means follows that it did not become a corporation *de facto* as between the complainant and defendants. From the facts setup in the bill it clearly appears that there was an honest attempt by the incorporators to organize a corporation authorized by the laws of this State. The necessary steps to perfect that organization were all taken as required by the statute, except that the final certificate was not recorded. It is shown by the bill that upon

the issuing of that certificate its directors elected the proper officers and proceeded to the transaction of business as a corporation, and continued to act as such until the filing of this bill, a period of more than five years. That these facts establish a corporation *de facto* is settled by numerous decisions of this court. *President and Trustees, etc. v. Thompson*, 20 Ill. 198; *Rice v. R. I. and A. R. R. Co.* 21 id. 93; *Baker et al. v. Administrator*, 32 id. 79; *Ramsey v. Marine and Fire Ins. Co.* 55 id. 311; *Cincinnati, Lafayette and Chicago Railroad Co. v. Danville and Vincennes Ry. Co.* 75 id. 113; *Louisville, New Albany and Chicago Ry. Co. v. Shires*, 108 id. 617; *Hudson v. Green Hill Seminary Corporation*, 113 id. 618.

That plaintiff in error, if he had been sued by the Consolidated Ice Machine Company on his subscription to its capital stock, could not have questioned its corporate existence on the grounds alleged in his bill, is directly settled by several of the above cited decisions. It is equally clear that if, during the time he was a member of said corporation, it had been sued as such, neither he nor any other of its members could have been heard to say that no such corporation existed. The general rule is, that one who deals with a corporation as existing *de facto*, is estopped to deny, as against it, that it has been legally organized. It is the settled rule in this State that the legal existence of a corporation *de facto* can not be questioned collaterally. See cases *supra*, and *Renwick et al. v. Hall et al.* 84 Ill. 162; *The People ex rel. v. Trustees of Schools*, 111 id. 171; *Keigwin et al. v. Drainage Comrs.* 115 id. 347.

It seems impossible to find a reason for placing the complainant in this bill in a more favorable position to deny the existence of the corporation in question than a mere subscriber to its capital stock, or one who, as a third party, had dealt with it as a corporation, and we are of the opinion that he could not do so in this collateral proceeding. He, however, not only seeks to question the legal organization of the corporation, but to have the same changed into a co-partnership between himself and the other incorporators, and to compel the defendants to account to him as his co-partners. "A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation." (1 Bates on Law of Partnership, sec. 3.) In *Phillips v. Phillips*, 49 Ill. 437, CATON, C. J., said: "A partnership can only exist in pursuance of an express or implied agreement, to which the minds of the parties have assented." This rule will not prevent the enforcement of liability against persons as partners, when sued by third parties. "Parties may so conduct themselves as to be liable to third persons as partners, when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain proof is positively known to the alleged parties to a firm." (*Phillips v. Phillips, supra.*) On this latter ground parties who have attempted

to organize a corporation, but have failed to comply with the law, so as to perfect their incorporation, may be held liable as partners to creditors, as in *Bigelow v. Gregory et al.* 73 Ill. 197. This liability rests on the doctrine of estoppel. When, however, even a creditor has dealt with the corporation as such, partnership liability can not be enforced, even though the corporation has not been legally organized. *Tarbell v. Page*, 24 Ill. 46.

It is wholly unnecessary, however, in this case, to determine when and under what circumstances third parties may proceed against incorporators acting under a defective or imperfect organization, as individuals or co-partners. In this case the complainant shows by his bill that he was not only one of the incorporators of the company he now seeks to question, but that he was, upon its complete organization, elected its secretary and general agent, and acted as such for several months prior to his alleged disability, during which time he was actively engaged in assisting to carry on its corporate business, and that upon his being restored to health he still recognized its corporate existence, and sought to be restored to his rights therein. If the recording of the certificate in question was essential to the organization of the corporation, there is nothing in this bill to show that it was not as much his duty to have it done as either of the other incorporators. We are unable to perceive, then, upon what principle he can now compel those who, for anything appearing in this bill, honestly supposed they were incorporated during all the time the business mentioned in the bill was being carried on, to account to him, upon the theory that they were his co-partners. In fact, if the allegation as to his mental condition at the time his stock was sold was omitted from the bill, it would strike any one as too clear for argument that he has failed to state a case entitling him to equitable relief, and it must, we think, be held, that whether that fact, together with the allegation that his stock was sold without notice and he ousted from all participation in the business of the company, would entitle him to his action for that alleged wrong, or to be restored to his former rights as a member of said corporation or not, no legal ground is shown by this bill for holding defendants liable to him as partners.

There is nothing in the case of *Flagg v. Stowe*, 85 Ill. 166, when the facts of that case are considered as they appear in that report, and in *Stowe v. Flagg et al.* 72 Ill. 397, contrary to the view here expressed. We have examined the numerous cases cited by counsel for plaintiff in error as giving support to the position that a corporation defectively organized may be treated as a co-partnership, and the members held liable as partners; but when it is borne in mind that complainant himself was a member of the corporation in question, and in no sense a third party, and that he is not seeking by this bill to recover for anything which he has been required to pay third parties for or on behalf of said corporation, they have no application. What he seeks to do is to have the corporation converted into a partnership, contrary



to the contract of the parties, simply because he and other incorporators failed to perfect, as he says, the corporation. He does not even show that he has been misled or in any way injured by the failure to have the certificate of complete organization recorded. Neither does he pretend that the omission of any of the incorporators to have the same recorded was willful, or in any way designed to injure him or others.

We can find neither authority nor reason to sustain this bill, and are clearly of the opinion that the decree of the circuit court is right.

*Decree affirmed.*

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### SNYDER v. STUDEBAKER.

1862. 19 *Indiana*, 462.

APPEAL from the *Wells* Circuit Court.

WORDEN, J. This was an action by *Snyder* against *Studebaker*, to recover possession of a certain tract of land. Judgment for the defendant.

The same question is presented by the pleadings and the evidence.

It appears that, in March, 1853, the plaintiff, who was then the owner of the land, conveyed the same to the *Fort Wayne and Southern Railroad Company*, by deed, duly executed and delivered.

This conveyance was made on account of a stock subscription.

Afterward, in November, 1855, the railroad company, for a valuable consideration, conveyed the premises to the defendant.

*The Fort Wayne and Southern Railroad Company* was chartered by an act of the legislature, passed in 1849; and it appears that the corporators named in the act in question met in the town of *Bluffton*, in said county of *Wells*, on the 19th day of November, 1851, and then and there accepted the act of incorporation, and organized the company pursuant to the provisions of said act.

If the corporation was not created before the 1st of November, 1851, when the new constitution took effect, it could have no existence at all, as that instrument prohibits the creation of corporations, other than banking, by special act. *The State v. Dawson*, 16 Ind. 40. *Harriman v. Southam*, *Id.* 190.

The plaintiff claims, that inasmuch as there was no acceptance of the charter, or organization under it, until after the adoption of the constitution of 1851, there was no such corporation as *The Fort Wayne and Southern Railroad Company* at the time he executed the conveyance, and, hence, that no title passed from him. But is he in a condition to dispute the existence of the corporation at the time he made his conveyance to it?

It has been held, in numerous cases in this State, that a party who has contracted with a corporation, as such, is, as a general proposition, estopped by his contract to dispute the existence of the corporation at the time of the contract. The following cases may be cited, though there are, perhaps, others reported, and some not reported as yet. *Judah v. The American Live Stock Insurance Company*, 4 Ind. 333. *The Brookville and Greensburg Turnpike Company v. McCarty*, 8 Id. 392. *Ensey v. The Cleveland and St. Louis Railroad Company*, 10 Id. 178. *Fort Wayne and Bluffton Turnpike Company v. Dean*, Id. 563. *Jones v. The Cincinnati Type Foundry Company*, 14 Id. 89. *Hubbard v. Chappell*, Id. 601. *The Evansville, etc. Railroad Company v. The City of Evansville*, 15 Id. 395. *Meikel v. The German Savings Fund Society*, 16 Id. 181. *Heaston v. The Cincinnati and Fort Wayne Railroad Company*, Id. 275.

The doctrine is by no means confined to the State, but prevails elsewhere. *The Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238. *All Saints Church v. Lovett*, 1 Hall, 191. *Palmer v. Lawrence*, 3 Sand. Sup. C. R. 161. *Eaton v. Aspinwall*, 6 Duer, 176. *Jones v. Bank of Tennessee*, 8 B. Mon. 122. *Worcester Medical Institution v. Harding*, 11 Cush. 285. *The Congregational Society v. Perry*, 6 N. H. 164. *People's Savings Bank, etc. v. Collins*, 27 Conn. 142. *West Winsted Savings Bank v. Ford*, Id. 282. Angell and Ames on Corp., sec. 94.

The estoppel arises upon matter of *fact* only, and not upon matter of *law*. Hence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it, to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of *fact*, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation. This proposition is substantially stated in the cases of *Jones v. The Cincinnati Type Foundry Company*; *Meikel v. The German Savings Fund Society*; and *Heaston v. The Cincinnati and Fort Wayne Railroad Company*, *supra*.

Let us apply the doctrine to the case before us. The corporators named in the act to establish the *Fort Wayne and Southern Railroad Company* had a right, at any time before the offer of the franchises was withdrawn, that is, before the constitution of 1851 was adopted, to accept the charter, and organize under it. If they did so accept the charter, and organize, the corporation was legitimately created, and the new constitution did not destroy it.

Whether they did so accept the charter, and organize, was a question of fact, and the plaintiff, by his conveyance, is estopped to deny such acceptance and organization.

That the corporators accepted the charter, and organized under it,

within the time when it was competent to do so, was as fully admitted by the contract, as was any other step necessary to an organization.

The conclusion necessarily follows, that the plaintiff is estopped to dispute the existence of the corporation at the time of his conveyance to it.

This point was ruled the other way in the case of *Harriman v. Southam*, 16 Ind. 190, but, upon more more mature reflection, we are satisfied that the decision upon this point was wrong, and should be overruled.

We may remark, also, that the doctrine of estoppel was erroneously applied in the case of *The Evansville, etc. Railroad Co. v. The City of Evansville*, 15 Ind. 395. There the point made was, that the law, under which the corporation was organized, was unconstitutional and void. A party, we have seen, does not, by his contract, estop himself to deny that there is any law, or any valid law, by which the corporation was authorized.

Some further observation, in respect to the case before us, will not be out of place. The doctrine of estoppel, as applied to the case, does not rest upon a mere technical rule of law. It has its foundation in the clearest equity, and the principles of natural justice. The doctrine of estoppel, *in pais*, is of comparatively recent growth, but is firmly and clearly established. "The recent decisions of the courts, both in this country and in England, appear to have given a much broader sweep to the doctrine of estoppel *in pais*, than that which formerly existed, and to have established that, in all cases where an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud, on his part, to controvert or impair, there the character of an estoppel will be given to what would otherwise be mere matter of evidence, and it will, therefore, become binding upon a jury, even in the presence of proof of a contrary nature." 2 Smith, Lead. Ca. p. 531, 1 Am. Ed. See, also, upon this subject, *Kinney v. Farnsworth*, 17 Conn. 355. *Middleton Bank v. Jerome*, 18 Id., 443. *Laney v. Laney*, 4 Ind. 149. In *Doe ex dem. Richardson v. Baldwin*, 1 Zabriskie, 397, it was said, that "The doctrine of estoppel rests upon the principle, that when one has done an act, or made a statement, which it would be a fraud, on his part, to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be cut off from the power of retraction. It must appear, 1. That he has done some act, or made some admission inconsistent with his claim; 2. That the other party has acted upon such conduct or admission; 3. That such party will be injured by allowing the conduct or admission to be withdrawn." Here the plaintiff, by his conveyance to the corporation, admitted that it had an existence, and could receive the title. Upon this act and admission of the plaintiff the defendant has acted, in purchasing the land of the company. If the plaintiff had not conveyed to the corporation, the defendant would not have purchased from it. The law will not now permit the plaintiff

to withdraw the admission made by him in conveying to the corporation, and deprive the defendant of the land which he purchased on the faith of such admission.

In our opinion, the judgment below is right, and must be affirmed.

*Per Curiam.*—The judgment is affirmed, with costs.

*John R. Coffroth*, for the appellant.

## SOCIETY PERUN v. CLEVELAND.

1885. 43 *Ohio State*, 481.<sup>1</sup>

ERROR to the District Court of Cuyahoga County.

Action by city of Cleveland to foreclose a mortgage, as against certain subsequent grantees, mortgagees, and purchasers. Perun, a corporation, Jan. 28, 1874, executed and delivered a mortgage to the city. This mortgage was not filed for record until Oct. 21, 1879. In February, 1874, certain persons attempted to organize, under general laws, a corporation by the name of Society Perun. In May, 1874, Perun delivered to Society Perun its deed, purporting to convey to the latter the premises theretofore mortgaged to the city. Between that date and Oct. 21, 1879, Society Perun, acting in its supposed corporate capacity, executed and delivered deeds and mortgages, purporting to convey and incumber parcels of these mortgaged premises to various parties, who are made defendants in the present suit. During the pendency of the present foreclosure suit, it was adjudged, in a *Quo Warranto* proceeding, instituted by the Attorney General, that the persons who attempted to incorporate under the name of Society Perun had not been legally incorporated, and that their attempted organization as a corporation was wholly void; and a decree of ouster was rendered. Upon the trial of the present foreclosure suit in the District Court, the plaintiff gave in evidence, against the objection of the defendants, the record of the *Quo Warranto* proceedings. Defendants offered evidence tending to prove an attempt in good faith to incorporate Society Perun. This evidence was excluded, and defendants excepted. The District Court found, among other things, that, as to the city of Cleveland, Society Perun was not a corporation either in law or in fact; that the conveyance to it by Perun was void as against the city; and that the claims of all the defendants (except certain claims for taxes and improvements) were subsequent and inferior to the lien of the city. To reverse the judgment rendered upon these findings, error was brought.

*Willson & Sykora*, for plaintiff in error.

*B. R. Beavis*, for executors of Stone, cross-petitioners in error.

*A. T. Brinsmade* and *W. E. Sherwood*, for city of Cleveland.

<sup>1</sup> Statement abridged. Arguments omitted. — Ed.

OWEN, J. The defendants below, conceding that Society Perun had never been a corporation *de jure*, maintain that the court below should have permitted them to prove that such society was a *de facto* corporation; that it attempted, in good faith, to become a body corporate; proceeded to act and transact business in good faith under the supposed authority of incorporation, and that its acts ought not to have been declared to be wholly void as against the city of Cleveland.

The judgment of ouster was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication it was competent for this court to consider and determine what had been its *status* from its first attempt to incorporate. But it had no power to pass upon or determine the rights of parties not before it.

It was not competent for this court to determine in that proceeding that Society Perun had never been a corporation *de facto*, or that its acts and business transactions, under the color of its supposed charter powers, were void. The authority of the court in that behalf was derived from sec. 6774 (Rev. Stats.), which provides: "When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs."

When the court had excluded the society from its franchises to be a corporation, it exhausted its jurisdiction over the subject-matter. It had no power to speak concerning whatever rights may have been acquired by the society as a corporation *de facto*, or by third parties in their transactions with it as an acting corporation.

It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city, having engaged in no transactions with it, is free to challenge its existence as a corporation *de facto* as well as *de jure*. The argument is that: "No case can be found where it is held that there is a corporation *de facto* against persons who have in no way recognized its existence as a corporation," and that: "The notion of a *de facto* corporation is based on the doctrine of estoppel; when estoppel can not be invoked there can be no *de facto* corporation."

The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a *corporation*.

"It is a self-evident proposition that a contract can not be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is

essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least *de facto*, at the time the contract was made." Morawetz Private Corporations, sec. 137.

It is bound by all such acts as it might rightfully perform as a corporation *de jure*. Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.

Proof was offered upon the trial below to show, (1) that the persons seeking to incorporate first filed with the secretary of state a certificate which fully complied with the requirements of the statutes, and free from the defect which finally proved fatal to its existence, but which was disapproved by the attorney-general; (2) That the certificate of incorporation which was finally filed with the secretary of state recited that, "said association has been formed and organized for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of said association; that the officers of said association have been duly chosen; that for the purpose of becoming a body corporate under an act passed by the general assembly of the state of Ohio, entitled, an act supplementary to an act, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, passed April 20, 1872;" (3) That this certificate was approved by the secretary of state, and also by the attorney-general, as provided by the statutes (69 Ohio L. 150); (4) That it proceeded in good faith to transact business peculiar to corporations provided for by the act under which it attempted to incorporate.

All this was excluded, and the decision of the court below practically rested on the proof offered by the city, that Society Perun had been ousted of its franchises, which was evidently construed as determining that such society had from the first no corporate existence, either *de jure* or *de facto*, and consequently no capacity to receive or impart any interest in or title to real estate except as against such parties as were by reason of their recognition of or dealings with it, estopped to deny its incorporate existence.

Did the court err? This fairly presents the controlling and very important question: Was it competent to show, as against a party who was not estopped to deny its corporate existence, that Society Perun

was, at the time of the transactions involved in controversy, a corporation *de facto*?

In *Attorney-General ex rel. Pettee v. Stevens*, Saxton (N. J. Eq.) 369, the relator sought to enjoin the Camden and Amboy R. R. and Transportation Co. and others acting under its authority from erecting a bridge over a navigable stream. The claim was that the act authorizing the corporation had been perverted and disregarded, and that there was no legal incorporation. The relators were in no manner estopped to attack the corporate existence of the respondent. The court held:

“Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done everything necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation; they are a corporation, *de facto*, if not *de jure*; and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers.”

The chancellor, speaking for the court, said:

“Here, then, is a set of men claiming to be a legally incorporated company under the act of the legislature, exercising all the powers and functions of a corporation. They are a corporation *de facto*, if not *de jure*. Every thing necessary to constitute them a corporation has been done, colorably at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me that if the court can take cognizance of the matter in this case, it must in all others where it can be brought up, not only directly, but incidentally.”

This case is approved and followed in *National Docks R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755, which held: “When a corporation exists *de facto*, the court of chancery can not, at the instance of private parties, restrain its operations upon the ground that its organization is not *de jure*. In such case the proper remedy is by *quo warranto*, or information in the nature thereof, instituted by the attorney-general.” The rule of estoppel found no place in this case.

In *S. & L. G. R. Co. v. S. & C. R. R. Co.*, 45 Cal. 680, it was held that: “If a corporation *de facto* is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser can not justify his entry thereon on the ground that it was only a corporation *de facto*, and was not *de jure* entitled to the franchise.”

In *Williams v. Kokomo B. & L. Ass'n.*, 89 Ind. 339, one Leach gave to an acting corporation his mortgage on real estate. Subsequent

to the execution and recording of it, he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defects and omissions in the proceedings to incorporate, and that the senior mortgage was void. He was in no manner estopped, by dealings with, or recognition of, the first mortgagee to deny its corporate existence. The court held that: "A junior mortgagee can not defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation *de facto*." Elliot, J., said: "Where persons assume to incorporate under the laws of the state, and in part comply with their requirements, assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such an association to a corporate existence, although there has not been a full compliance with the provisions of the statute. *Baker v. Neff*, 73 Ind. 68. *This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application.*" It is not easy to distinguish the principle of this case from that of the case at bar.

In *Pape v. Capitol Bank*, 20 Kan. 440, Pape and wife gave their notes to "James M. Spencer or bearer," and their mortgage on real estate to secure them. Spencer transferred the notes to the Capital Bank of Topeka, an acting corporation, with this indorsement: "Pay the bearer, without recourse on me; James M. Spencer." The mortgage was also transferred to the bank, which proceeded by suit to collect the notes and foreclose the mortgage. Pape and wife interposed the defense that the bank was not, and never had been, a body corporate, by reason, among others, of a defective organization. The bank had assumed corporate functions after an attempt, in good faith, to incorporate, and for a number of years was in the actual and notorious exercise of corporate franchises. Pape had transacted banking business with the plaintiff prior to the purchase of the notes and mortgage, but such business was wholly unconnected with the notes and mortgage in suit. His wife, however, had not in any manner recognized the existence of the bank as a corporate body, and the doctrine of estoppel was not invoked to aid the court in sustaining a judgment of foreclosure against Pape and wife. Brewer, J., says: "The corporation is one *de facto*; and only the state can inquire, and that, in a direct proceeding, whether it be one *de jure*. . . . There must, in such cases, be a law under which the incorporation can be had; there must, also, be an attempt, in good faith, on the part of the incorporators, to incorporate under such law; and when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after



yy the incorporation, are subjects of inquiry in such an action. *This is not upon the ground of equitable estoppel but upon grounds of public policy.* If the state, which alone can grant the authority to incorporate, remains silent during the open and notorious assertion and exercise of corporate powers, an individual will not, unless there be some powerful equity on his side, be permitted to raise the inquiry."

In *Thompson v. Candor*, 60 Ill. 244, Willetts, in February, 1858, deeded to "Mercer Collegiate Institute," a body pretending to be a corporation, the tract of land in controversy. He died in March, 1858. In 1868 his heirs quit-claimed their interest in the land to Thompson, who filed a bill in chancery for the cancellation of the deed from Willetts to the "Institute," alleging, as one of the grounds of relief, that the named grantee was not legally incorporated — had no capacity to take the title, and that the deed was void. The court held:

"Where parties endeavor to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body *de facto*, and the regularity of its organization can not be questioned collaterally. Such irregularity can only be questioned by *quo warranto* or *scire facias*."

Thornton, J., says: "In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected by the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large amount of money. Here then was a corporate body *de facto*, which had been engaged in an undertaking involving important interests. The regularity of its organization can not be questioned collaterally. Any alleged non-compliance with the law can only be inquired into by the writ of *quo warranto* or *scire facias*."

There is no suggestion throughout the entire case of the rule of estoppel as an element affecting its disposition.

In *Paper Works v. Willett*, 1 Robertson (N. Y. Sup.), 131, it is held that formal defects in proceedings to organize a corporation are not available to defeat an action brought by a corporation for trespass, in wrongfully taking property out of its possession.

See also, as illustrating the principle under discussion: *Smith v. Sheeley*, 12 Wall. 361; *Grand Gulf Bank v. Archer*, 8 S. & M. 151, 173; *Dunning v. R. R. Co.* 2 Carter (Ind.), 437; *Dannebrogue Mining Co. v. Allment*, 26 Cal. 286; *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315; *Mitchell v. Deeds*, 49 Ill. 416; *Eliz. Academy v. Lindsey*, 6 Ired. 476; *Darst v. Gale*, 83 Ill. 136; *Rondell v. Fay*, 32 Cal. 354; *De Witt v. Hastings*, 40 N. Y. (Superior Court) 463; *Rice v. R. R. Co.*, 21 Ill. 93; *Douglas County v. Bolles*, 94 U. S. 104; *The Banks*

v. *Poitiaux*, 3 Randolph (Va.), 136; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Baker v. Backus*, 32 Ill. 79; *Tarbell v. Page*, 24 Ill. 46; *Thornburgh v. R. R. Co.*, 14 Ind. 499; *Tar River Nav. Co. v. Neal*, 3 Hawks, 520; *Bear Camp River Co. v. Woodman*, 2 Me. 404.

In *Jones v. Dana*, 24 Barb. 395, it was held that if a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a note from an individual, it is, as to him *and all third persons*, a corporation *de facto*, and the validity of its corporate existence can only be tested by proceedings on behalf of the people.

In the case at bar, the certificate which was last filed by the society embraced a full statement of the objects of incorporation and indicated what the nature of its business must necessarily be, and was strongly suggestive of the manner in which it must necessarily be transacted; and while it is not our purpose to call in question the action of this court in the quo warranto proceedings, we have no hesitation in saying that if we were now called upon to determine whether the corporate life of Society Perun should be taken, the question, upon the facts offered in proof at the trial below, would not be free from doubt and difficulty. It is very clear that the proceedings to incorporate were colorable; and so far as this fact is a test of the existence of a corporation *de facto*, it is most amply established. That there was proof of user is manifest from the evidence which was received without objection.

That the judgment of ouster did not and could not have a retroactive effect upon the rights of the society, and of parties who had dealt with it during its *de facto* existence, is suggested by the opinion of Wright, J., in *Guff v. Flesher*, 33 Ohio St. 115.

The evidence which was offered and excluded would, if credited, have shown Society Perun capable of holding and transferring the legal title to the lands in controversy. *Walsh v. Barton*, 24 Ohio St. 43; *Darst v. Gale*, 83 Ill. 136; *Shewalter v. Pirner*, 55 Mo. 218; *Nat. Bank v. Matthews*, 98 U. S. 628; *Goundie v. Northampton Water Co.*, 7 Penn. St. 233; *Barrow v. Nashville Turn. Co.*, 9 Humph. 304; *Kelly v. People's Trans. Co.*, 3 Ore. 189; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 758.

The public and all persons dealing with this society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him, and also by the attorney-general, as required by statute (69 Ohio L. 150), and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation (69 Ohio L. 83), "a copy, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association."

It would seem that such approval, record, and certificate, followed by uninterrupted and unchallenged user for nearly six years, of all of which proof was tendered, would constitute a corporation *de facto*, if such a body is, under any circumstances, entitled to legal recognition.

The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void.

The principle of the above cases is to be distinguished from a case where a mere corporation *de facto* attempts to assert the power of eminent domain by the appropriation of private property to public use. It has been held that the exercise of this right (which is but a delegation of the sovereign power of the state), depends upon the sufficiency and legal validity of the certificate of incorporation and public record of its organization. *R. R. Co. v. Sullivant*, 5 Ohio St. 276; *Atkinson v. R. R. Co.*, 15 Ohio St. 21.

The case of *Raccoon River Nav. Co. v. Eagle*, 29 Ohio St. 238, is relied upon by the defendant in error. It was an action to recover upon a stock subscription. A plea of *null tiel corporation* was interposed. The plaintiff claimed to be organized under an act to authorize the incorporation of companies "for the purpose of improving any stream of water . . . declared navigable by any law of the state of Ohio." On the trial the plaintiff offered in evidence a certificate by which it appeared that the company was formed for the purpose of improving, etc., Big Raccoon river. Unfortunately there was no navigable stream in Ohio by that name. No other testimony was offered. There was no proof of user. There was no defect in the form of the proceedings to incorporate, but an attempt to organize and incorporate for a purpose impossible of accomplishment. There was neither a *de jure* nor *de facto* corporation. Judgment was properly rendered for defendant.

In excluding proof of what was actually done looking to the incorporation of Society Perun, and of the subsequent acts of user, which was offered in evidence, there was error, for which the judgment in the first entitled case (as well as that in the same plaintiff against Hay et al., which was tried with it and involves the same general questions) are reversed. Numerous other questions are presented by the voluminous records in these cases, but as they all depend upon the one central and controlling question discussed above, and as the disposition here made of the cases must lead to a re-trial in the light of the principles indicated in this opinion, they are not separately considered.

*Judgment reversed.*

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### BRADLEY ET ALS. v. REPPPELL.

October Term, 1895. Supreme Court of Missouri, Division No. 1.<sup>1</sup>

BRACE, P. J. This is an action in ejectment in common form to recover the possession of certain lands described in the petition, situate in Kansas City; instituted in the Circuit Court of Jackson County,

<sup>1</sup> From copy of opinion furnished by Clerk of Supreme Court.

taken thence by change of venue, and tried, in the Circuit Court of Clay County.

The answer was a general denial, and a plea of the statute of limitations as to a part of the land, and no claim as to the remainder. Issue was joined by reply.

On the trial, at the close of the plaintiff's evidence, the court sustained a demurrer to the evidence as to the plaintiff T. C. Bradley, and overruled it as to the other plaintiffs, Samuel F. Freeman and the Atlas Investment Company. The trial then proceeded, and after all the evidence was heard, the issue was submitted to the jury, who returned a verdict for the defendant. Thereupon plaintiffs filed motions for new trial and in arrest of judgment. The motion for new trial coming on to be heard, was sustained and the verdict set aside on the following grounds, "specified of record."

"9th. Because the Court erred in refusing to admit as evidence a certified copy of the Warranty Deed dated August 20, 1880, from the West Kansas City Land Company to Charles W. Whitehead, which certified copy was offered in evidence by plaintiff.

16th. Because the Court erred in refusing to admit as evidence the certified copy of the Quit Claim Deed from the West Kansas City Land Company to Charles W. Whitehead, which is offered in evidence by the plaintiff."

From the order sustaining this motion and setting aside the verdict, the defendant appeals.

(1). By a Special Act of the Legislature approved March 14, 1859 (Sess. Acts, 1858, p. 292), The West Kansas City Land Company was incorporated with power "to make contracts, sue and be sued," and to "purchase and hold any quantity of land in Kaw township in Jackson County, Missouri, not exceeding one thousand acres; to lay the same off into parks, squares, and lots, improve, sell or convey the same by deed; to re-purchase and re-convey any portion of the same, when necessary in transacting the legitimate business of said company; and purchase and hold any personal property necessary for the purposes above indicated." Nothing was said in the act either directly or indirectly as to the duration of the company's corporate existence. By the general law in force at the time this company was thus incorporated it was provided that "Every corporation, as such, has power, to have succession by its corporate name for the period limited in its charter and when no period is limited, for twenty years." R. S. 1855, Vol. 1, p. 369. Sec. 1. "And that upon the dissolution of any corporation, the president and directors or managers of the affairs of the corporation at the same time of the dissolution shall be trustees of such corporation with full power to settle its affairs." R. S. 1855, Vol. 1, p. 375, Cap. 34, Sec. 24. The corporation thus chartered was an ordinary business corporation whose corporate existence by virtue of these statutory provisions expired on the 14th of March, 1879, State ex rel. vs. Payne, 29 Mo. 468, and the two deeds rejected by the court upon the trial were executed after that date in the name and under the corporate seal of the company "by William McCoy, Presi-

dent." "Attest: Edw. A. Allen, Secretary." The defendant objected to the introduction of these deeds offered in evidence by the plaintiffs as constituting a part of their chain of title, and in support of his objections read in evidence the Act of the Legislature aforesaid incorporating said company, and it was admitted that said company in whose behalf said deeds had been so executed, was the same company by said act, incorporated, and that it was never thereafter re-incorporated. The defendant's claim of title was by adverse possession, and there is not in the case any question of estoppel to deny the existence of the corporation by reason of the relation sustained by the defendant to the land company, or of any dealings by him directly or indirectly with it, or any person connected with, or representing it. Why then should the defendant be precluded from showing, by the law that gave that company its corporate existence, that, at the time these deeds were made, it was dead, incapable of executing a legal conveyance of the real estate in question, and that said deeds were therefore void, and no evidence of title? The answer returned by the counsel for plaintiffs to this question is, "That it is the settled law of this State that a conveyance to, or by a corporation *de facto* can be assailed on the ground of lack of corporate existence *only by the State*."

This answer does not meet the question, unless it be assumed that a corporation whose corporate existence has expired by the terms of the law which created it, still exists as a *de facto* corporation as to all persons except the State, an assumption that we think is not sustained by the authorities cited, and is not "the settled law in this State." On the contrary, in this State, as elsewhere unless otherwise provided by statute, the law is, that where the term of the existence of a corporation is fixed by its charter or the general law, upon the expiration of that term, the corporation becomes *ipso facto* dissolved; it can no longer act in a corporate capacity, and its title to property ceases. 2 Beach on Private Cor. Sec. 780; 2 Morawetz, Sec. 1031. In such an event in this State the title to its property is by statute devolved upon trustees for the settlement of its affairs and the distribution of its assets. R. S. 1855 supra, R. S. 1889, Sec. 2513; and thereafter it has no power to make a legal contract or convey property in its corporate name and capacity. It ceases to be a corporation, *de jure et de facto*, for the reason that there is no law in force authorizing its existence, and no law by virtue of which it *might exist*, and no person unless estopped by his own action, ought to be, or can be precluded from showing this fact, apparent on the face of the law itself, without the necessity of any judicial investigation; in an issue involving his own personal rights and interests.

An examination of the authorities cited by counsel for respondents, and of all the other cases touching this question, will show that it has never been otherwise ruled in this State, nor elsewhere so far as we have been able to discover.

The first case cited by counsel for respondent McIndoe vs. St. Louis, 10 Mo. 576, does not touch the question, side, edge, or bottom.

The cases of *Chambers v. St. Louis*, 29 Mo. 543; *Land v. Coffman*, 50 Mo. 243; *Shewalter v. Pirner*, 55 Mo. 218; and *Conn. Mutual Life Ins. Co. vs. Smith*, 117 Mo. 26; go no farther in the direction of our present inquiry than to hold that where *an existing corporation* has power to acquire, hold and dispose of land the question whether such corporation has transcended the limits of such power in respect thereto can only be raised and determined in a direct proceeding by the State against the corporation. But this falls far short of the question here; which goes to the fact of the *existence* of the corporation, conceded in these cases.

It is also well settled law that one who has contracted with an organization as a corporation, in its corporate name, is estopped from denying the existence of such corporation at the time of making the contract, or of alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract. 4 *Thomp. Corp.* 5275; 4 *Am. & Eng. Encycl. of law*, p. 198 and cases cited note 1, p. 199; 2 *Morawetz Priv. Corp. Sec.* 750, 753; *Beach on Corp.*, Sec. 13. And so it has been ruled in this state in many cases, including those next cited in the brief of counsel for respondent. *Ohio & M. R. R. Co. vs. McPherson*, 35 Mo. 13; *Farmers & Merchants Ins. Co. v. Needles*, 52 Mo. 18; *City of St. Louis v. Shield*, 62 Mo. 247; *Stoutimore vs. Clark*, 70 Mo. 471; *Studebaker Bros. v. Montgomery*, 74 Mo. 101; *St. Louis Gas Light Co. v. City of St. Louis*, 84 Mo. 302, affirming 11 Mo. App. 55; *Broadwell v. Merritt*, 87 Mo. 95; *Grandy Mining Co. vs. Richards*, 95 Mo. 106. Of course such estoppel extends as well to the *privies* of; as to the parties to such contracts. *Hasenritter v. Hirschhoffer*, 79 Mo. 239; *Ragan v. McElroy*, 98 Mo. 349; *Broadwell v. Merritt*, 87 Mo. 95; *Reinhard v. Va. Lead Mining Co.* 107 Mo. 616. The rulings in none of these cases, however, support the contention that the deeds should have been admitted in evidence in the case in hand, in which, as has been already seen, there is no question of estoppel.

Nor do the cases of *Finch v. Ullman*, 105 Mo. 255, or *Crenshaw v. Ullman*, 113 Mo. 633, cited by plaintiff's counsel; in which it was ruled where there was a law authorizing the existence of a corporation, at the time when the organization assumed to act, and did act as such corporation, — that its corporate existence as to such act could not be called in question in a collateral proceeding; sustain respondent's contention. It is true in these and other cases, it is sometimes broadly stated as settled law, in substance, "that a transfer of property to or by a corporation *de facto* will be binding and valid as against all parties except the state," but this is simply a re-statement in another form of the proposition ruled. It implies that the case is one in which a corporation may by law exist, for there can be no corporation *de facto* when there cannot be a corporation *de jure*. 1 *Beach on Priv. Corp. Sec.* 13; 4 *Thomp. Corp. Sec.* 523-5275; at least as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its

existence. Whatever may be the rule as to these, as to all other persons, there must be at least color of law for its corporate existence to preclude such inquiry, and it would seem to go without saying, that a law which gives existence to a corporation for a certain number of years at the end of which time it must surely die, cannot give color to its corporate existence after the date of its death as decreed by the terms of that same law.

Judge Thompson in his recent work on Private Corporations says: "There is much judicial authority for the proposition that where a corporation is brought to an end by the lapse of time, that is, by the expiration of the distinct limitation of its life in its charter, any further exercise of its corporate powers, may be questioned collaterally. The governing principle here is that upon the expiration of the time limited by the charter for the existence of the corporation its dissolution is complete. 'The dissolution in such case,' it has been said, 'is declared by the act of the Legislature itself.' The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead." Thomp. Corp. Sec. 530, citing in support of the text, *People v. Manhattan Co.*, 9 Wend. N. Y. 351; *Morgan v. Lawrenceburg Ins. Co.*, 3 Ind. 285; *Wilson v. Tesson*, 12 Ind. 285; *Grand Rapids Bridge Co. v. Prague*, 35 Mich. 400; *Dobson v. Simonton*, 86 N. C. 492; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Bank of U. S. v. McLaughlin*, 2 Cranch C. C. (U. S.) 20. Further on in the same section, however, he says: "On the other hand it has been ruled in Missouri, that the question whether the charter of a corporation has expired by limitation of time, can be adjudicated only in a direct proceeding by the State, that such a defense cannot be set up collaterally in an action by the corporation," — citing the single case of *St. Louis Gas Light Co. v. City of St. Louis*, 84 Mo. 202, affirming 11 Mo. App. 55.

In *Sturges v. Vanderbilt*, supra, decided in 1878, RAPALLO J. said: "It is further claimed that until a corporation is declared dissolved by Judicial decree, creditors may proceed against it by its corporate name, and that it remains *in esse* until formally adjudged dissolved. All the cases cited in support of this proposition relate to a dissolution in consequence of insolvency, or non user, or mis-user of the corporate franchises, or some other cause of forfeiture. In such cases it is well settled that the dissolution does not take effect until judicially declared. But the principle upon which that class of cases rests, is not applicable to a dissolution by expiration of the charter. The dissolution in such case is declared by the act of the Legislature itself. The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead. *People v. Walker*, 17 N. Y. 503; *Greely v. Smith*, 3 Story C. C. R. 658. Where the charter of a corporation is annulled by act of the legislature the corporation is extinct and no judgment can be rendered against it (*Mumma v. Potomac Co.*, 8 Pet. 286; *Merrill v. Suffolk Bank*, 31 Me. 57). We have been referred to no authority holding a contrary doctrine."

After a very extended search for, and a careful examination of, the cases, both before and since the date of this decision, we also have been unable to find any authority in contrary of this doctrine; unless it can be found in the *Gas Light Co.* case above cited by Judge Thompson or in *Miller v. Coal Co.*, 336 also cited by him, and to these cases our attention will be directed.

In *St. Louis Gas Light Co. v. City of St. Louis*, which was an action by a corporation upon a written contract entered into between plaintiff and defendant, the defendant claimed that the plaintiff could not maintain its action thereon, because its corporate life had expired before the making of the contract and the institution of the suit. Upon this claim the court ruled, that, the defendant having by entering into the contract with the plaintiff admitted the capacity of the plaintiff to enter into a binding obligation as a corporation, the defendant was estopped to deny plaintiff's corporate existence, when sued upon a promise contained in such contract. After having by this ruling fully covered the point in issue, Judge Thompson, who delivered the opinion of the court, in the same connection, closed this paragraph of his opinion by adding the following dicta: "Whether or not its charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding such as this. *It can only be raised in a direct proceeding between the state of Missouri and the defendant.* *City of St. Louis vs. Shields*, 62 Mo. 247, 251." The case cited by the learned judge was one in which it was sought to draw in question the constitutionality of an act incorporating the plaintiff, in which the court held that the act was constitutional, and further that the defendant having entered into the contract with the city admitted its corporate capacity and was estopped from denying it in an action upon such contract. While the latter ruling supports the ruling in the case in which it is cited by Judge Thompson, and is in harmony with all the cases, it does not support *his dicta* therein, that the question whether the charter of the corporation has expired by limitation "*can only be raised in a direct proceeding between the State of Missouri and the defendant.*" The dicta being, then, *obiter*, to the case then in hand, and unsupported by the case cited for it, is not to be regarded as authority. In the case of *Miller v. Coal Co.* 31 West. Va. 836, it was held, under the statute of that state, providing, in effect, that when a corporation shall expire or be dissolved, suits may be brought, continued or defended, property conveyed, and all lawful acts be done in the corporate name in the like manner and with like effect as before such dissolution or expiration so far as is necessary to wind up its affairs: That, a corporation continuing in business, and committing a tort after the expiration of the term of its existence, as provided by its charter, was precluded from setting up the expiration of its corporate existence as so provided in an action against it by the person injured by such tort. Here we have a law by which the corporation might exist for certain purposes after its charter term had expired, and a state of facts which precluded the corporation from denying its existence. In other words: *law for the existence of the corporation*, and an *estoppel to deny it*. These two elements are alike wanting in the proposition of the dicta of Judge Thompson, and in the facts of the case under consideration, and this West. Va. case, no more than the case of the *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. 55 (*the ruling in which, but not the dicta, was approved in 84 Mo. 202*) is authority for his proposition or the respondent's contention in the case in hand.



We are cited by counsel for respondent to one other case, which has not yet been noticed, the case of the Catholic Church v. Tobein, 82 Mo. 418, in which it was held that the plaintiff suing as a corporation acquired no right to property devised to an unincorporated organization of the same name, by a will which took effect before the plaintiff was incorporated.

It cannot be seen how this case can in any way support the respondent's contention. On the contrary the ruling could have been made only upon an inquiry and finding that the alleged corporation was non-existent at the time the will took effect. It was non-existent then because there was no law authorizing its existence. If inquiry could be legitimately made in that case whether there was any law in force authorizing the existence of that corporation, why can not a like inquiry be made in the present case? The defendant was not precluded from making such inquiry by any act of his own, or of any other person under whom he claimed. He did not propose to bring in question the validity of any law, authorizing the existence of the corporation at the time these deeds were made, or the regularity or validity of the corporation organized under such a law, or the validity of any of the acts of such corporation to determine which would require judicial investigation; but simply to show by the law which once had given corporate existence to the West Kansas City Land Company that, at the time these deeds purport to have been executed, that corporation had ceased to exist, and could not have executed them. Upon no principle of law with which we are familiar can he be precluded from so doing, and we think no well-considered case can be found, that properly understood, gives support to a ruling to that effect. We have been speaking of the law of the company's existence as a unit, for we fail to discover how the fact that the limit of the term of existence, being contained in the general law, and not in the special Act, can in any way affect the principle we have been discussing. The general law became a part of the charter of the company at the moment of its creation, and must be read into it, the same as if it had been written therein. It follows from what has been said that the trial court committed [no] error in rejecting the deeds aforesaid when offered in evidence by the plaintiffs, and that it did commit error in setting aside the verdict for defendant, and granting a new trial on the ground that it did commit error in refusing to admit said deeds in evidence.

We can review cases only upon the record made by the trial court, authenticated to us in the manner provided by law, and having thus reviewed this case and found that the trial court committed error in setting aside the verdict and granting a new trial for the reasons specified of record, and no other ground for such action appearing upon the record thereof before us, the same is reversed and set aside and the cause will be remanded to the circuit court with directions to enter up judgment in accordance with the verdict. All concur.

PER CURIAM: The foregoing opinion handed down in Division No. 1, is adopted as the opinion of the Court in Banc. GANTT, SHERWOOD, MACFARLANE, and BURGESS, JJ., concurring with BRACE, C. J., therein. BARCLAY and ROBINSON, JJ., dissenting. Judgment will therefore be entered as directed in the opinion.

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SLOCUM v. PROVIDENCE STEAM AND GAS PIPE CO.

1870. 10 *Rhode Island*, 112.<sup>1</sup>

SLOCUM v. WARREN.

1871. 10 *Rhode Island*, 116.<sup>1</sup>

BILLS in equity, praying that defendants might be enjoined from selling plaintiff's land under executions recovered by them against the American Steam and Gas Pipe Co. The plaintiff was found by the Court to be a stockholder in the latter Company. Chapter 128, Rev. Stat., provides that every manufacturing company shall annually file a certain certificate; and that, if any of said companies shall fail so to do, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing. It appeared that one, at least, of the creditors, Elizabeth Warren, made a loan to the Company, relying for repayment not only upon the credit of the Company, but also upon the personal liability of the stockholders, and of the plaintiff especially as one of them. Plaintiff contends that he is not subject to any such liability, for the reason that the American Steam and Gas Pipe Company never had any legal existence as a corporation.

*Bradley and John Eddy*, for plaintiff.

*B. N. & S. S. Lapham, James Tillinghast and Cobb*, for defendants.

DURFEE, J. [in *Slocum v. Providence &c. Co.*]. . . . The charter, or act of incorporation, for the American Steam and Gas Pipe Company, was granted or passed in 1867, the capital named in the charter or act being seventy-five thousand dollars. At that time, there was in force in the state a public statute which provided that no act of incorporation granted after the passage thereof, "for any other than for religious, literary, charitable, or cemetery purposes, or for a military or fire company, shall take effect until the persons therein incorporated shall have paid to the general treasurer the sum of one hundred dollars, if the capital limited by such act of incorporation is the sum or

<sup>1</sup> Statement abridged. Only portions of the opinions are given. — Ed.

any less sum than one hundred thousand dollars." The hundred dollars, required by this statute, was not paid for the American Steam and Gas Pipe Company, and consequently, their act of incorporation never went into effect, if it is to be construed as passed subject to the statute. We think it is to be so construed, there being no clause of the act excepting it out of the operation of the statute. See *The Union Horse Shoe Works v. Lewis*, 1 Abbott U. S. 518.

The defendants contend that, even if the act has never gone into effect, the existence of the company as a corporation cannot be questioned in a collateral proceeding. It is undoubtedly the rule that, if a charter has once been duly granted and accepted, the state alone can enforce a forfeiture of the charter for any violation thereof, or failure to comply with its considerations on the part of the corporation; and that, until the state sees fit to enforce the forfeiture, the corporation is to be recognized as legally existing in all collateral proceedings. But here, the act of incorporation being inoperative, there never was any corporation to incur a forfeiture, or any charter to be forfeited. We know of no rule which precludes inquiry into the question, whether a company which assumes to act as a corporation has ever been incorporated, in any case, in the absence of any matter of estoppel to prevent the inquiry.

But the plaintiff, in order to have the relief which he seeks, ought to satisfy us, not only that his company is not a corporation, but also that he is entitled to show the fact as against its creditors. We assume, as we think the bills warrant us in assuming, that the plaintiff is a stockholder in the American Steam and Gas Pipe Company, though he has done nothing as such, except hold his stock. The question then is, whether a stockholder, who does nothing but hold his stock, is estopped, when pursued by a creditor of the supposed corporation, from denying its existence. We think he is so estopped. By becoming and continuing a stockholder, he holds himself out as a corporator, and so contributes to the belief that the company with which he is associated is a corporation. To permit a person who has so held himself out to say that he is not a corporator, when legally pursued as such, would be to permit him to take advantage of his own wrong. He is like a person who, having held himself out or suffered himself to be held out as a copartner, may be charged with the copartnership debts. Or he is like a person who, without authority, as executor or administrator, intermeddles with the property of a decedent, and so becomes chargeable as an executor in his own wrong. The plaintiff having assumed the character of a corporator, where he is sought to be charged as such, ought not to be heard to say that the character was falsely or unlawfully assumed. The fact that he was not active in the business of the company cannot avail him; for it is the assumption to hold the stock as if he were a corporator, which makes the mischief. It might easily happen that the stockholder, whose name contributed most to the credit of the supposed corporation, was least active in its busi-

ness, and it would be plainly unjust to exempt him from liability to the creditors, merely because of his inactivity.

We are aware that in *Utley v. Union Tool Company*, 11 Gray, 139, the Supreme Court of Massachusetts exempted a stockholder from liability to a creditor of a supposed corporation, upon proof that the corporation had never legally come into being under the statute of that state. But it does not appear that in that case the question of estoppel was raised by the counsel or considered by the court. We should agree entirely with the Supreme Court of Massachusetts in their decision in any case in which the estoppel would be inapplicable.

DURFEE, J. [in *Slocum v. Warren*]. . . . We decided in the former case that having, by becoming a stockholder, helped to hold the company out as a corporation, he could not be permitted to say, when pursued by a creditor of the company, that he and his associates or predecessors had omitted to do an act which they ought to have done before organizing as a corporation, and that in consequence of this delinquency the company was not (what it purported to be) a legally established corporation. The plaintiff maintains that this decision was erroneous, and in support of his view, relies especially upon the cases of *Hudson v. Carman*, 41 Maine, 84; *Unity Insurance Company v. Cram*, 43 N. H. 636; *Utley v. Union Tool Company*, 11 Gray, 139; and *Gardner v. Post et al.* 43 Pa. St. 19. We propose to consider these and some of the other cases bearing upon the question, somewhat in detail.

[After commenting on various authorities, the opinion proceeds.]

The plaintiff also cites cases in which it has been held that a corporation duly established as such is not estopped from denying its liability where there is a want of power to contract the liability, the reason being, he says, that otherwise the powers of the corporation might be indefinitely enlarged; and he argues that, in the case at bar, the doctrine of estoppel is still less applicable, inasmuch as the company was acting not merely in excess of its corporate powers, but without any corporate power whatever. But in the case at bar, the defect of power exists not by reason of any insufficiency of the grant, but by reason solely of a delinquency on the part of the grantees of the power; and the estoppel, if applied, would be applied not to prevent an appeal to the charter to show a want of authority, but to prevent the introduction of evidence by the company or its members to prove their own delinquency. We do not think that in such a case there should be any hesitation to apply the doctrine of estoppel from fear that it would lead to an indefinite enlargement of the powers of the corporation. And see *Burgate v. Shortridge*, 5 H. L. Cas. 297, 318; *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Company et al.* 23 How. U. S. 381.

[After citing and commenting upon other authorities, the opinion proceeds.]

It is true these cases are not precisely like the case at bar, but they are cases which illustrate the application of the law of estoppel in respect to corporations, or companies acting as corporations, or which illustrate to what extent the corporate existence of a company acting as a corporation can be collaterally questioned. And we think it is safe to say upon the authority of these cases, that at least where there is an act or charter in existence, under which a company by taking the proper steps can become a corporation, if a company does *de facto* organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations, by persons who have dealt with it as such in good faith, be permitted to avoid a corporate liability thereon, by setting up that it has not taken all the steps prescribed as conditions precedent to its legal existence as a corporation. If this be so in regard to the company as a whole, we do not see why it is not equally so in regard to each member of the company individually, in so far as membership imports an individual liability. In this case, it is said there was no act or charter; but in our opinion there was a charter duly granted by the legislature, subject only to a condition that it should not take effect until a certain act should be performed; but inasmuch as this act could have been performed, as it ought to have been performed, by the grantees of the charter before their organization as a corporation, the case does not, in our view, substantially differ from cases which are clearly within the rule above stated. Indeed it is frequently the case that a charter is granted subject to an implied condition, that the grant shall not take effect until it has been duly accepted; and yet, as we have seen, the doctrine of estoppel may be applied to prevent the want of such an acceptance from operating to defeat a just claim. *Camp v. Byrne, supra*; and see *Tobacco Pipe Makers' Co. v. Woodroffe*, 8 D. & R. 30, cited in Abbott's Dig. Law of Corp. p. 331, § 23. In this case the company had only to pay into the treasury of the state one hundred dollars, and all would have been right. When it organized as a corporation, and from year to year continued doing business as such, it as much as said, and each one of the stockholders as much as said, that that sum had been paid; and now neither the company nor any one of the stockholders ought to be heard to assert the contrary in order to escape any liability to which he or it would have been subject if the payment had been duly made.

This decision is doubtless a hard decision for the plaintiff, and we very much regret that his situation is such that he is so severely affected by it. But hard as the decision is for the plaintiff, it only subjects him to the liability to which he would have been subjected if the tax due the state had been paid, as it ought to have been paid, and therefore only to the liability which, as an honest man, he must be presumed to have intended to incur when he connected himself with the company.

[*Plaintiff's prayer denied.*]

## NARRAGANSETT BANK v. ATLANTIC SILK CO.

1841. 3 *Metcalf*, 287.<sup>1</sup>

SHAW, C. J. The first of these cases was assumpsit on a bill of exchange, drawn on the company at four months' date, and accepted by Samuel B. Tuck, treasurer. This company was incorporated as a manufacturing corporation by *St.* 1836, c. 108. The defendants contended, that in order to recover against the defendant corporation it was incumbent on the plaintiffs to prove that the company had complied with the provisions of the *Rev. Sts.* c. 38, §§ 4, 9, and c. 44, § 3, regulating the organization of manufacturing corporations. These provisions require them to choose a clerk and treasurer; that the clerk shall be sworn, and shall keep a record of votes; that the capital stock shall be divided into shares; that the first meeting shall be called by a prescribed form of notice, &c. The court are of opinion, that this argument of the defendants proceeds upon an erroneous view of the law; especially in cases, where a party, who is a stranger, and not presumed to have access to the books, and to have notice of the proceedings of a corporation, is proceeding to recover against a company acting as a corporation. Many of the requisitions of the statutes referred to are directory to the corporation, its officers and members, and are not conditions precedent to the existence and capacity of the corporation to contract.

But were it necessary to prove the regular organization of the corporation, the objection would come with an ill grace from the defendants, and under the circumstances must be deemed untenable. It is the duty of such corporations to keep records; the primary and only regular evidence of their organization is legally presumed to be in their records and the defendants decline producing those records, on notice, without assigning any reason. The maxim of law is, that all things shall be presumed to have been rightly and correctly done, until the contrary is proved. This maxim is stated and explained, and many instances given of its application to corporations, and to acts and doings of their members, officers and agents, in *Bank of U. States v. Dandridge*, 12 Wheat. 70. As the corporation could not proceed lawfully, until duly organized, and as they did proceed to act as a corporation, this presumption has its effect. The defendants have the records, which prove such organization, if it took place, and withhold them. This maxim under these circumstances, would go far to establish the actual and regular organization of the defendant corporation.

But the court are of opinion, that in an action against a corporation, it is not incumbent on the plaintiff to prove that the defendants have complied with the requisitions of the statutes, where they are not in

<sup>1</sup> Statement, and part of opinion, omitted. — ED.

terms, or by necessary or reasonable implication, conditions precedent to their existence, or capacity to do particular acts. It has been held that the existence of a corporation, and of course its organization, may be proved by reputation, and by its actual use, for a length of time, of the powers and privileges of a corporation. *Dillingham v. Snow*, 5 Mass. 547. *Stockbridge v. West Stockbridge*, 12 Mass. 400. In regard to manufacturing corporations, which are of more recent origin in this Commonwealth, it is in general sufficient to give in evidence the act of incorporation duly authenticated,<sup>1</sup> and the actual use of the powers and privileges of an incorporated company, under the name designated in the act of incorporation. *Bank of U. States v. Dandridge*, 12 Wheat. 64. *Utica Ins. Co. v. Tillman*, 1 Wend. 555. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296. *Fire Department of New York v. Kip*, 10 Wend. 266. These were cases in which the corporation, whose organization was in question, were plaintiffs. The rule applies *à fortiori* to the case of a plaintiff seeking to enforce an obligation against a corporation.

And we think it highly necessary to the purposes of justice, that the law should be so held; otherwise a company might avail themselves of the powers and privileges of a corporation, without subjecting themselves to its duties and obligations, and might set up their own neglect of duty, or wilful non-compliance with the requisitions of law, to discharge themselves of such obligations. Nor would this be the whole extent of the wrong done by such construction, in regard to manufacturing corporations. It has been the policy of this Commonwealth to give a qualified remedy against the individual members of manufacturing corporations, as collateral security to their debts and obligations. But any construction, which would destroy or impair the obligation of the corporation, would, to the same extent, take from creditors their remedy against the members.

As to the evidence in regard to the fact of acting as a corporation, it is stated hereafter in reference to the other case.<sup>2</sup>

*Judgment on the verdict for plaintiff.*

<sup>1</sup> Acts of incorporation are now deemed public acts; Rev. Sts. c. 2, § 3; and printed copies of them, published under the authority of the government, are to be admitted as sufficient evidence thereof, in all courts of law, &c. Rev. Sts. c. 94, § 58.

<sup>2</sup> [In the opinion in the case of *Westcott v. Atlantic Silk Co.*, heard at the same time, Shaw, C. J., says: "The act of incorporation being shown, there was evidence tending to prove that the company went into operation, established a factory, and erected machinery; . . ."]

## JONES v. CINCINNATI TYPE FOUNDRY CO.

1860. 14 *Indiana*, 89.<sup>1</sup>APPEAL from the *Grant* Circuit Court.

PERKINS, J. — Suit upon a promissory note.

“The *Cincinnati Type Foundry Company*, a corporation,” &c., complains of *David W. Jones*, defendant,” &c., upon a promissory note, of which a copy is set out thus :

“\$279. *Indianapolis, Indiana, October 11, 1857.*

“Six months after date, I promise to pay to the order of the *Cincinnati Type Foundry Company*, two hundred and seventy-nine dollars, for value received, without relief from valuation laws.

*David W. Jones.*”

The defendant demurred to the complaint. The demurrer was overruled, and rightly.

The defendant then answered —

1. That he was not indebted to the plaintiffs.
2. That each and every allegation of the complaint was untrue.
3. That the plaintiffs had not a legal capacity to sue, because not a corporation.

Issue. Trial. The note constituted all the evidence. Judgment for the plaintiffs on the note.

The appellant contends that the case was not made out against him, because it was not proved that the appellees were a corporation, and thus possessed of the capacity to sue.

The appellees insist that the note sued on is a contract with them as a corporation, and that their existence is thereby admitted.

As a general proposition, it is the law of this state that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. *Shappel v. Hubbard*, at this term.

And it has been held in other states that where individuals are incorporated upon performance of certain acts, a person who contracts with them by their corporate name, cannot, in an action against him on the contract, deny the performance by them of the acts necessary to give them a corporate existence. *Hamtrank v. The Bank of Edwardsville*, 2 Miss. R. 169. — *Tarr River Navigation Co. v. Neal*, 3 Hawks, 520. See 1 U. S. Dig., 593 ; 4 *id.* 433.

In *New York*, to work such estoppel, it has been necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state.

If the style by which a party is contracted with is such as is usual in creating corporations, viz., naming an ideality, but disclosing that of

<sup>1</sup> Part of opinion omitted. — ED.



no individual, as is usual in the cases of simple partnerships, it has been treated as *prima facie*, at least, indicating a corporate existence. And such seems to have been the rule at common law. Grant on Corp., 62. Probably, a special answer, in such cases, in the nature of a plea in abatement, might, at the proper time, be made available. See Ang. and Ames on Corp., 506, 507, and the numerous cases in our own Reports.

And there is no hardship in this. The party executing the note owes the amount of it. The judgment upon it in the suit merges it, and the payment of the judgment satisfies it, and bars any other action against the maker for the money.

But, in this class of cases, it would seem, after all, that the Courts have proceeded upon a rule of evidence, rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation, really as evidence of the existence of a corporation, more than as an estoppel to disprove such fact. Grant, in his late learned work on Corporations, says: "Generally, the fact of an aggregate body being called by a name, is, *prima facie*, evidence that they are incorporated, 'for the name argues a corporation.' *Norris v. Stups*, Hobart, 11. But the Courts take judicial notice that '*A. B. and company*' is not the name of a corporation. *Rex v. Harrison*, 8 T. R. 508."

The doctrine of conclusive estoppel seems more properly applied to cases involving the question of legality of organization, where the fact of an existing statute, authorizing, in the given case, such corporation, is known to the Court, either by judicial notice or actual evidence in the cause.

In such cases, where a party has contracted with a body as being organized as a corporation under the law, he will be estopped to dispute the legality of the organization. See the cases cited in the U. S. Dig., and Ang. and Ames, *ubi supra*.

This doctrine of estoppel, as applied to contracts with corporations, needs further examination; but it is not important in this case, and we shall not here pursue it. The decision of this case will rest upon another ground.

[The learned Judge then takes the position that the general denial in the answer admits the plaintiff's capacity to sue, and that the subsequent paragraph denying plaintiff's capacity is in the nature of a plea in abatement and is inconsistent with such general denial.]

*Judgment affirmed.*

## STOUTIMORE v. CLARK ET ALS.

1879. 70 *Missouri*, 471.<sup>1</sup>

## APPEAL from Clay Circuit Court.

The action, *Stoutimore v. Clark*, was brought to establish a certain charge as a lien upon the land formerly the property of Joseph Y. Clark, now deceased; and to obtain a decree for the sale of the land to satisfy the charge. By order of court, the Missouri City Savings Bank, and John Chrisman, were made defendants in said suit. The Bank filed an answer alleging a lien under a judgment against Clark, rendered March 27, 1874. This judgment was founded on a note of said Clark payable to the order of the Missouri City Savings Bank, at the office of said Bank. Chrisman filed an answer alleging a lien on part of the land under a trust deed, executed by Clark Sept. 19, 1874, to secure a loan. Chrisman also filed a cross answer to the answer of the Missouri City Savings Bank, alleging that said Bank was not a corporation. Upon the trial, to prove the corporate organization and existence of the Bank, a certificate signed by the alleged president and secretary was offered in evidence. To the admission of this certificate Chrisman objected, on the ground that it did not comply with the statutory requirements. This objection was sustained, and the evidence was excluded. The Circuit Court ordered the sale of the land; and directed that the judgment of the Bank should be paid out of the proceeds before the claim of Chrisman. Chrisman appealed from an order denying his motion for a new trial.

*D. C. Allen*, and *Samuel Hardwicke*, for appellant.

The doctrine of estoppel does not apply. It takes two to make an estoppel. There must be a party estopped, and a party in whose favor the estoppel works. *Herman on Estoppel*, 40, 41. It is plain from the evidence that the Missouri City Savings Bank never had a corporate existence, nor a lawful organization on which corporate existence could be based. The Circuit Court in excluding the certificate dated April 24th, 1869, so held. Hence there was no person in whose favor an estoppel could work. *Douthitt v. Stinson*, 63 Mo. 279. The judgment against Clark being a nullity (because not rendered in favor of any legal entity), no question of estoppel arises under it. *Bigelow on Estoppel*, 21, 283; *Wixom v. Stephens*, 17 Mich. 518.

[Omitting remainder of argument.]

*Simrall & Sandusky*, for respondent.

By the execution of the note Clark admitted the corporate existence of the Missouri City Savings Bank, and he was estopped thereafter from denying its corporate existence. [Omitting citations.] It was unnecessary to allege that plaintiff was a corporation; and therefore

<sup>1</sup> Only so much of the report is given as relates to one point. — Ed.

unnecessary to prove it. Clark was not only estopped by the execution of said note from denying the corporate existence of the bank, but he was also estopped by the judgment. If the defense, *nul tiel corporation*, was open to him at all, it should have been asserted before the rendition of said judgment.

[Omitting remainder of argument.]

NORTON, J. . . .

In support of these positions it is insisted by counsel that, inasmuch as, on the trial of the cause, the Missouri City Savings Bank failed to introduce evidence establishing the fact that it was a corporation, the said judgment rendered in its favor was a nullity and did not create a lien upon the real estate of Clark.

We think the view thus taken is unsound. The note upon which said judgment was rendered is as follows:

“\$4,000.

MISSOURI CITY, July 1st, 1870.

Four months after date we promise to pay to the order of the Missouri City Savings Bank, Four Thousand Dollars, negotiable and payable at the office of the Missouri City Savings Bank, Missouri City, Mo., without defalcation or discount, for value received, with interest at ten per cent per annum from maturity until paid.

GILMER, CLARK & Co.

J. Y. CLARK.

R. G. GILMER, Security.”

We think it clear that in the suit instituted by the bank on this note Clark would not have been allowed to deny the corporate existence of the bank for the reason that by executing the note he admitted the fact that it was a corporation, which estopped him from disputing it. This principle was distinctly enunciated in the case of *National Insurance Co. v. Bowman*, 60 Mo. 252, following the case of *Farmers and Merchants Insurance Co. v. Needles*, 52 Mo. 17, and the case of *O. & M. R.R. Co. v. McPherson*, 35 Mo. 13. In the case of *City of St. Louis v. Shields, et al.*, 62 Mo. 247, it was expressly held that the obligors on a bond given to a corporation by making and signing the instrument admit the corporate capacity of the obligee, and in a suit on such bond cannot plead *nul tiel corporation*. The cases cited indisputably establish that Clark, the obligor in the note upon which the judgment rests, could not have set up as a defense that the bank was not a corporation, and it therefore follows that the judgment, so far from being a nullity as counsel contend, was rightful and proper, and from the time of its rendition became a lien on the real estate of Clark in Clay county, and was conclusive and binding not only on him but upon all claiming through or under him.

[After discussing the doctrine of privity.] It thus appearing that Clark, against whom the judgment in favor of the bank was rendered, could not have prevented its rendition by disputing the corporate existence of the bank it therefore necessarily follows from the principles

above announced that Chrisman, the beneficiary in the deed of trust executed subsequently to the rendition of the judgment, and conveying to the trustee for him land upon which said judgment had become a lien, occupied no better position than Clark. The judgment being efficacious to create a lien on Clark's land, could not have been drawn in question by Clark on the ground that it was a nullity, because the bank was not a corporation; nor can it be assailed on the ground by Chrisman, who became a privy in estate by reason of the grant made by Clark to him in the deed of trust of part of the land upon which the judgment was attached as a lien.

*Judgment affirmed.*

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## CALLENDER v. PAINESVILLE & HUDSON RAILROAD CO.

1860. 11 *Ohio State*, 516.<sup>1</sup>

ERROR to the Court of Common Pleas of Cuyahoga County. Reserved in District Court.

Plaintiffs filed petition to recover debt and damages claimed under a written contract of defendant, an incorporated company, executed on the part of the company by Van R. Humphrey, as its president.

George W. Steele filed a motion to dismiss; stating that he was a member and secretary of the company, denying the validity of the service of the summons, and alleging that said company is not a corporation. The Court of Common Pleas dismissed the action, holding that, in view of the defects in the certificate of organization under the general statute, the defendant was not a duly organized corporation or liable to be sued as such.

SUTLIFF, J. [After considering the question as to the validity of the certificate, and intimating that the only objection to it raised by counsel was untenable.]

But in this case the original petition alleged that the defendant was a corporation. The contract upon which the action was brought, a copy of which was appended to the petition, purported to be executed by the defendant, as a corporation; and the motion and the affidavit of the mover, disclosed, at most, only a defect in the act of incorporation. But the affidavit admits that the company had attempted in all respects to comply with the requisitions of the statute, and in fact obtained, by a supposed compliance on their part, the acceptance and record of their certificate by the secretary of state, a copy of which was to them a valid charter, as they supposed. And the affiant further states that he had acted as their secretary for some three years, and

<sup>1</sup> Only so much of the case is given as relates to one point. — ED.

that the president of the company was then residing at Painesville, where the company then kept its office.

It thus appears that the members of the company obtained their charter, supposed themselves a legally incorporated company, and had continued to hold themselves out, and to act as such, to and with the public, and are still so acting. Nor is there any denial, either in the motion or affidavit of Steele, that their president, Humphrey, was not authorized by himself and others of the association, to execute said contract on behalf of the association, as an incorporated company.

Under such circumstances, the members of the company, and especially the officers of the company, are estopped to deny its existence as a corporation. However mistaken in fact, no person, whether artificial or natural, is permitted to so conduct and represent himself as to induce reasonable men, at his instance, to act upon the truth of such representations in their contracts and dealings with him, and to then deny the truth of such representations, to the prejudice of the party so having relied upon them.

In order for the company, or any member thereof, to so repudiate its conduct, and disprove the truth of its own representation, it is necessary for it, not only to show an honest mistake, but that such mistaken representation had not induced the adverse party, in the exercise of reasonable prudence on his part, to give the credit, make the contract, and act under it in confidence of the truth of such conduct and representations.

But in this case, not only has the association obtained a copy of the certificate, its charter of incorporation, and represented itself to the other party to be a corporation, by making the contract in that capacity, but it has continued to act in a corporate capacity down to the time of filing the motion; and the member so filing the motion states that he is still the officer of the corporation. It thus appears that, instead of contradicting the misrepresentation, before the contract was made, the company had not, even after making the contract, either in conduct or representation, ever denied their corporate character.

Under such circumstances, to suffer the defendants to repudiate their first conduct, and deny the truth of their representations, by which the plaintiffs had been induced to contract with them, and upon which both parties had acted, would be in contravention of those principles of equity upon which the doctrine of estoppel rests, and its operative effect to prevent fraud depends.

We are, therefore, clearly of opinion that, at the time of the hearing of the motion, the company and its members who had so held themselves out to be a corporation, were estopped to deny that fact, for any defect whatsoever, if the same had in fact existed in their charter.

The judgment of the court of common pleas must, therefore, be reversed, and the cause remanded. *Judgment accordingly.*

SCOTT, C. J., and PECK, GHOLSON and BRINKERHOFF, JJ., concurred.

BOYCE v. TRUSTEES OF TOWSONTOWN STATION OF  
THE M. E. CHURCH.

1877. 46 *Maryland*, 359.<sup>1</sup>

**ASSUMPSIT** against an alleged religious corporation. Defendants appeared by counsel, and pleaded, 1st, that the defendants are not and never were a body corporate, as alleged. Plaintiff offered in evidence an agreement or certificate of incorporation under a general statute. The statute required this document to be acknowledged before two Justices of the Peace, or a Judge of the Circuit Court or of the Supreme Bench of Baltimore. It was acknowledged before a single Justice of the Peace. Plaintiff, to show user of the corporate name and franchise, offered in evidence a deed of land to said Trustees; and a mortgage from said Trustees to Crook and Hiss, Trustees.

All the above evidence was rejected, and plaintiff excepted. Verdict and judgment for defendants. Plaintiff appealed.

*Wm. A. Fisher* and *Orville Horwitz*, for appellant.

*Arthur W. Machen*, for appellee.

STEWART, J. . . . But the appellant has undertaken to offer evidence of certain acts and proceedings of the appellee, referred to in the exceptions, to show that it held itself out as a corporation, and treated with the appellant as such, and is estopped from denying its liability as a corporation.

We think it would be extending the doctrine of *estoppel* to an extent, not justified by the principles of public policy, to allow it to operate through the conduct of the parties concerned, to create substantially a *de facto* corporation, with just such powers as the parties may by their acts give to it.

This would be substituting the dealings of the parties, for compliance with the requirements of the law, and giving to them the same effect through the aid of the Courts. Thus, virtually, through the Courts, recognizing the existence of the corporation, in manifest disregard of the written law.

It has been determined by this Court, that a corporation cannot bind itself in excess of its powers. *Penna. Steam Navigation Co. vs. Dandridge*, 8 G. & J., 319.

Whilst denying its capacity upon any principle of estoppel, to make contracts *ultra vires*, to bind itself; it would not be consistent with that theory to recognize its *existence ad libitum*, according to the conduct of the parties concerned.

Such a principle would seem to **affix** no other limit to the existence of the corporation *de facto*, or the extent of its power than the dealings of the parties, through the recognition of the Courts, might, upon the doctrine of estoppel, prescribe.

<sup>1</sup> Statement abridged. Arguments, and part of opinion, omitted. — ED.

It would be more reasonable to hold corporations to their contracts, though *ultra vires*, of which they have received the benefit, or to prevent parties who have contracted with them, and received the benefit therefrom, from defeating their liability, on the ground of want of power in the corporation, as is held in quarters of high authority, (see note and references in *2nd Kent*, 351,) than to hold that corporations should be deemed to have existence, because they had so held themselves out.

The statute law of the State, expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administration of justice.

*Judgment affirmed.*

## CHAPTER IV.

## INTERPRETATION OF CHARTERS.

## DOWNING v. MOUNT WASHINGTON ROAD CO.

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1860. 40 *New Hampshire*, 230.

ASSUMPSIT, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation, in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, &c., and thence to some point on the northwesterly side of said mountain, &c., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road," "the obtaining the right of way," and "what other action he shall deem proper, for the interests of the company," &c.

A committee was appointed "to settle in relation to the right of way, &c., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."



It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or enter into such a contract.

*Kittredge & Bellows*, for the plaintiffs.

*George & Foster*, for the defendants.

BELL, C. J.<sup>1</sup> Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. *Trustees v. Peaslee*, 15 N. H. 330; *Perrine v. Chesapeake Canal Co.*, 9 How. 172. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. *Enfield Bridge v. Hartford R. R.*, 17 Conn. 454; *Strauss v. Eagle Co.*, 5 Ohio (N. S.) 39.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travelers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair and natural construction.

The charter of the Mount Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the north-west side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations, relating to directors, stock, dividends, meetings, &c. Laws of 1853, chapter 1486.

This charter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted.

<sup>1</sup> BELLOWS, J., did not sit.

Such charters have in former years been very common in this and other States, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. *State v. Commissioners*, 3 Zab. 510.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over their said road." By *their business*, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, &c., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travelers, &c. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travelers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought every thing the legislature intended to authorize by this additional act. Connected as this authority now is with travelers, horses and carriages, there is scarce a pretence for argument, that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hotel company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their

purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. *Indiana v. Woram*, 6 Hill 37; *Ex parte Peru Iron Company*, 7 Cow. 540; *Farmer's Loan v. Clowes*, 3 Comst. 470; *Same v. Curtis*, 3 Seld. 466; *Biers v. Phenix Company*, 14 Barb. 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact being shown, will ordinarily constitute a perfect defence. *Green v. Seymour*, 3 Sandf. Ch. 285; *Bangor Boom v. Whiting*, 29 Me. 123; *Life &c. Company v. Manufacturers &c. Company*, 7 Wend. 31; *New-York &c. Insurance Company v. Ely*, 5 Conn. 560.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. *Beach v. Fulton Bank*, 3 Wend. 573; *Albert v. Savings Bank*, 1 Md. Ch. Dec. 407; *Abbot v. Baltimore &c. Company*, 1 Md. Ch. Dec. 542; *Strauss v. Eagle Insurance Company*, 5 Ohio (N. S.) 59; *Baron v. Mississippi Insurance Company*, 31 Miss. 116; *Bank of Genesee v. Patchin Bank*, 3 Kern. 315; *Gage v. Newmarket*, 18 Q. B. 457.

The contract set up in this case was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in *McCullough v. Moss*, 5 Den. 567; overruling the case of *Moss v. Rossie Lead Co.*, 5 Hill 137, and in *Central Bank v. Empire Co.*, 26 Barb. 23; *Bank of Genesee v. Patchin Bank*, 3 Kern. 315.

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Den. 567, above cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation — the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

## PROPRIETORS OF THE STOURBRIDGE CANAL v. WHEELEY.

1831. 2 *Barnewall & Adolphus*, 792.

THIS case was argued in the last term<sup>1</sup> by Sir *James Scarlett* for the plaintiff, and *Campbell* for the defendants. The facts of the case, the several clauses of the act of parliament upon which the question arose, and the arguments urged, are so fully stated and commented on in the judgment delivered by the Court, that it is deemed unnecessary to notice them here.

*Cur. adv. vult.*

LORD TENTERDEN, C. J., in the course of this term, delivered the judgment of the Court.

This case was argued before us in the last term. It was an action of assumpsit brought by the plaintiffs to recover the sum of 492*l.* 9*s.* as a compensation for the use of a way or passage for boats loaded with coals and other merchandise, along a part of the plaintiffs' canal, made under the powers of the 16 G. 3, c. 28, an act of parliament for making and maintaining the Stourbridge Canal with two collateral cuts. This canal was formed upon two levels; the upper or summit level, which communicates with the Dudley Canal, then intended to be made and since completed; upon the whole of which level there is no lock; and the lower or Stourbridge level, extending from Stourbridge to Stourton; and the two levels are connected by a chain of sixteen locks. The defendants have carried large quantities of coals and other goods, part from the Dudley Canal, part not, along the upper level, without

<sup>1</sup> Before Lord TENTERDEN, C. J., LITLEDAL, PARKE, and TAUNTON, Js.

passing through any lock. Until recently they have paid to the plaintiffs a compensation in the nature of tonnage for the coals and goods so carried, as other persons have also done; but the defendants having latterly refused to do so, this action has been brought; and the question is, whether the plaintiffs are entitled to demand anything for the use of the part of the canal on which the defendants have so navigated; if they are, the sum claimed is admitted to be reasonable, and the plaintiffs are entitled to recover it: if they are not, the previous payments by the defendants cannot render them liable, and the plaintiffs cannot recover anything.

The canal having been made under the provisions of an act of parliament, the rights of the plaintiffs are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not *clearly* given to them by the act. This rule is laid down in distinct terms by the Court in the case of *The Hull Dock Company v. La Marche*, 8 B. & C. 51, where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company v. Hustler*, 1 B. & C. 424.

Adopting this rule, we are to decide whether a right to demand some compensation for the use of this part of the canal, is *clearly and unambiguously* given to the plaintiffs by this act of parliament; and we think it is not.

The act of parliament recites that the proposed canal will be of public utility (p. 732); the company are empowered to purchase land for the use of the navigation (p. 748); the lands acquired by voluntary or compulsory sale are vested in the proprietors for the use of the navigation, and for no other use or purpose whatsoever (p. 759); and all persons whatsoever are to have free liberty “to navigate upon the canal and collateral cuts with any boats or other vessels” of certain dimensions, “and to use the wharfs and quays for loading and unloading any goods, wares, merchandise, and commodities; and also to use the towing paths with horses for hauling and drawing such boats and vessels *upon payment of such rates and dues as shall be demanded by the said company of proprietors not exceeding the rates before mentioned in the statute*” (p. 788). This refers to a previous clause, p. 777, which provides that, in consideration of the great charge and expense of the proprietors in making, maintaining, and supplying with water the canal and collateral cuts, &c., it shall be lawful for the company from time to time to ask, demand, take, and recover for their own use and benefit for the tonnage and wharfage of iron, &c., and other commodities navigated, carried, and conveyed thereon, such rates and duties as they shall think fit, not exceeding the sum of sixpence for every ton of iron, &c., navigated on any part of the canal, and

which shall pass *through any one or more of the locks* which shall be erected on the said canal. A similar provision is made for the tonnage and wharfage of goods in vessels navigated on the collateral cuts ; and a power of bringing an action for arrears or distraining is given to the company.

Now, it is quite certain that the company have no right *expressly* given to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal or the collateral cuts ; and it is therefore incumbent upon them to show that they have a right *clearly* given by inference from some of the other clauses.

One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal, p. 788, and it is contended that no persons have a right to use any part of the canal under that clause, except those who actually do pay some of the rates or dues, and consequently pass some of the locks ; and that if individuals have no right to navigate a particular part, the company may make their own bargain as to the terms upon which they may be permitted to do so.

But the clause in question is capable of two constructions ; one, that those persons who pass the locks, and therefore pay the rates, and those *only*, are entitled to navigate any part of the canal or cuts ; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favour of the company, the latter is in favour of the public and against the company, and is therefore, according to the rule above laid down, the one which ought to be adopted.

And indeed the more obvious meaning of this clause is, to declare that the canal is dedicated to the public, but, at the same time, to preserve the right of the company to the rates already given ; and it is reasonable to suppose that, by the section p. 777, which gives the rates as a compensation for the expenses of the proprietors, the legislature meant to include *all* the benefit they were to derive from the canal, and not to leave the company to make what agreement they pleased with the public in cases not provided for, and to gain an unlimited profit from a particular part of it. They probably did not contemplate the case of persons using the canal who did not pass any lock ; but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the company.

Another section upon which some reliance was placed, was that in page 789, which gives to the owners of adjoining lands the power to use any pleasure boats on the canal, &c. (so as the same do not pass through any lock), without paying any rates or dues for the same, and so as such boat be not *used for carrying any goods* ; and it is argued that the inference arising from the latter part of this clause is, that pleasure boats carrying goods would be liable to pay rates, though they should pass no locks ; and if pleasure boats, then all other boats should be equally liable. And there is no doubt but that this provision does

afford some colour for this argument. The object of the clause appears to have been, partly to secure the right of the proprietors to use the canal with pleasure boats; (and in that respect it was introduced *pro majore cautela*;) and partly to prevent the company being injured by their passing through locks; and the framer of the clause seems to have added the last provision in the section merely to put pleasure boats with goods on board, on the footing of loaded vessels, without considering whether loaded vessels were liable to duties or not. At any rate this clause is not sufficient, in our judgment, to enable us to say that it is *clear* the legislature intended to give the plaintiffs the right to the compensation claimed for the use of a part of the canal where there is no lock.

Upon the principle of construction, therefore, above laid down, viz., that the company are entitled to impose no burthen on the public for their own benefit except that which is clearly given by the act, we are of opinion that, as their right to claim this compensation is not clearly given by the act, the plaintiffs are not entitled to recover.

*Judgment for defendants.*

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## WHITAKER v. DELAWARE & HUDSON CANAL CO.

1878. 87 Pa. State, 34.<sup>1</sup>

CASE to recover for damages to plaintiff's lumber rafts while passing through the schute of defendants' dam, alleged to have resulted from the improper construction and maintenance of such dam. At the trial, in the Court of Common Pleas, after evidence had been introduced by both sides, WALLER, P. J., directed a verdict for defendants. Plaintiff took a writ of error.

*G. G. Waller*, for plaintiff in error.

*H. M. Seely*, for defendant in error.

TRUNKEY, J. The defendants were incorporated under the laws of New York, and by divers statutes of this state, are vested with certain public franchises. For the purposes of the grant the dam across the Delaware river was built about fifty years ago, and the right to maintain it is conceded. In the Act of 1825, Pamph. L. 142, is a provision "That the said company shall not erect any works, or make any improvement, connected with the Delaware river, unless the same shall be so constructed as to leave the channel of said river as safe and as convenient for the descent of rafts as it now is." The plaintiff complains that the river is not as safe and convenient for navigation as before the erection of the dam. Unquestionably this is so. A dam in

<sup>1</sup> Statement abridged. Arguments, and part of opinion, omitted. — Ed.

a stream is an impediment and in some degree renders its navigation less safe and convenient. A literal construction of this provision makes it impossible to build and maintain the dam, and the conceded right vanishes. The statutes of this state, recognizing those of New York, and in connection therewith, conferring the power to construct a great public highway, are nugatory under a strict construction of the section providing for safe and convenient navigation of the river. This was not the legislative intent. It could not have been intended to grant a franchise to build a public highway, in connection with one in a sister state, and so clog it that the work could never be executed.

Various statutes, from time to time, have been enacted authorizing public improvements, some of which would obstruct or impede the navigation of rivers, and others the use of streets and roads, which contained provisions forbidding such obstructions and impediments. The courts have uniformly held that these provisions should be liberally construed, so as not to destroy the grant. For instance, the act of incorporation of the Monongahela Bridge Company contained a declaration that nothing therein contained should authorize the erection of a bridge over the Monongahela river "in such manner as to injure, stop, or interrupt the navigation of the said river, by boats, rafts or other vessels." It was held that the proviso was not intended to prevent the erection of piers in the bed of the river, yet piers in the bed of a navigable stream inevitably endanger navigation and render it more difficult. They do not necessarily "injure, stop or interrupt the navigation" in the sense in which these words were used by the legislature. A strict literal meaning was not intended, and in the very nature of things, it never could have been. When the purpose of the franchise is the performance of a public act, the grant is to be so interpreted as to enable the act to be done. The extension of one highway over another is a public act, and not less so because of the power to exact tolls: *Monongahela Bridge Co. v. Kirk*, 10 Wright, 112. The charter of the Erie and North East Railroad Company had a provision that "The said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane or bridge now laid out, opened or built." "These words taken literally and in their strongest sense would prevent the railroad from being made on the streets at all. But we follow authority in saying they are not to be so interpreted. The defendants have a right to use a street if they take care to obstruct it as little as the nature and character of their improvement will permit, if they create no material or unnecessary impediment — no obstruction which could be avoided by any reasonable expenditure of money or labor. They cannot occupy the whole of a street and drive the public away from it altogether. But any street which is wide enough for the railroad and public both may be used on the terms mentioned." Per BLACK, C. J., *Commonwealth v. E. & N. E. Railroad Co.*, 3 Casey 365.

It is no departure from the current of decisions, but in its direct line, to hold that the defendants can enjoy their franchise, can lawfully



construct and maintain their dam, taking care to obstruct the channel as little as the nature and character of the improvement will permit, and leaving it as safe and convenient for the navigation of rafts as could be by any reasonable expenditure of money and labor. Their franchise is for the construction of one highway over another. The whole community are interested in both. Private charters are strictly interpreted. In them what is not expressed or necessarily implied, is not granted, and what is doubtful is resolved in favor of the sovereign. But when the sovereign grants a public franchise over a highway, a clause relative to the use of said highway will not be so construed as to defeat the grant.

The plaintiff does not claim merely for consequential damages, resulting solely from the construction of the dam. If he did, the defendants' answer would be found in *Clark v. Birmingham and Pitts. Bridge Co.*, 5 Wright 147, and *Monongahela Bridge Co. v. Kirk*, *supra*.

He claims further for an immediate injury, consequent upon the defendants' negligence, in that they "built and left the said dam in and across said highway, in a dangerous, insecure and impassable state and condition." His averment implies much more than such obstruction as was necessary for the purposes of the franchise, and, if established, and there was no contributory negligence, his right to recover is clear. If he adduced sufficient proof of such negligence, it should have been submitted to the jury.

[After considering the evidence, the Court held, that it was insufficient to warrant a finding that the defendants were guilty of negligence.]

*Judgment affirmed.*

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## PROPRIETORS OF CHARLES RIVER BRIDGE v. PROPRIETORS OF WARREN BRIDGE.

1837. 11 *Peters U. S.* 420.<sup>1</sup>

ERROR to Supreme Court of Massachusetts. Bill in equity to enjoin the building of Warren Bridge, and for general relief.

In 1650, the Massachusetts Legislature granted to Harvard College the power to dispose, by lease or otherwise, of the ferry from Charlestown to Boston. In 1785, the legislature incorporated "The Proprietors of Charles River Bridge," for the purpose of erecting a bridge in the place where the ferry was then kept. The charter was limited to forty years from the opening; the company were to pay 200*l* annually to Harvard College; and at the end of the forty years the bridge was

<sup>1</sup> Statement abridged. Arguments omitted. — ED.

to be the property of the commonwealth, saving to the college a reasonable annual compensation for the annual income of the ferry. The bridge was opened in 1786. In 1792, the legislature chartered The Proprietors of West Boston Bridge to bridge the same river at a point about a mile and a half from the first bridge. The 7th section of the act of 1792 extends the charter of Charles River Bridge to seventy years from its opening; inasmuch as the erection of West Boston Bridge "may diminish the emoluments of Charles River Bridge." In 1828, the legislature incorporated Proprietors of Warren Bridge to erect another bridge across Charles River, distant only sixteen rods on the Charlestown side and about fifty rods on the Boston side from the bridge of the plaintiffs. Warren Bridge, by the terms of its charter, was to be surrendered to the State, as soon as the expense of building and supporting it should be reimbursed; and this period was in no event to exceed six years from the time of beginning to receive toll. A supplemental bill was filed, alleging that the Warren Bridge had been so far completed as to be open for travel. In the argument in the U. S. Supreme Court, it was admitted that sufficient toll had been received by the owners of the Warren Bridge to reimburse their expenses, that the bridge has now become the property of the state and has been made a free bridge; and that the value of the franchise granted to the owners of the Charles River Bridge has, by this means, been entirely destroyed.

In the Supreme Court of Massachusetts the judges were equally divided in opinion; and the bill was there dismissed by a decree *pro forma*. 7 Pick. 344.

*Dutton and Webster*, for plaintiffs.

*Greenleaf and Davis*, *contra*.

TANEY, C. J.

The plaintiffs in error insist mainly upon two grounds: 1. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge;" and that under and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel as the rights of the ferry. 2. That independently of the ferry right the acts of the legislature of Massachusetts of 1785, and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error con-

tend that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge, in 1828, impairs the obligation of one or both of these contracts.

It is very clear that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs in claiming under either of these rights must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract.

[The learned judge then held, that the ferry rights, and all franchises connected therewith, were extinguished, and not transferred to the Charles River Bridge corporation.]

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge," and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument, of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals.

[The learned judge here cited and commented upon *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 793, *ante*.]

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits,

the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established.

[After referring to *U. S. v. Arredondo*, 6 Peters, 738; *Jackson v. Lamphire*, 3 Peters, 289; and *Beatty v. Lessee of Knowles*, 4 Peters, 168; the opinion proceeds.]

But the case most analogous to this, and in which the question came more directly before the court, is the case of the Providence Bank v. Billings and Pittman, 4 Pet. 514, and which was decided in 1830. In that case, it appeared that the legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the State, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law was passed, imposing a tax on all banks in the State; and the right to impose this tax was resisted by the Providence Bank, upon the ground that, if the State could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court, the late chief justice states the principle, in the following clear and emphatic language. Speaking of the taxing power, he says, "as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." The case now before the court, is, in principle, precisely the same. It is a charter from a State. The act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge, is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power ; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established ; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade ; and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a State has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass ; the community have a right to insist, in the language of this court above quoted, “ that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the State to abandon it does not appear.” The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation ; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, was not confined to the taxing power ; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question ; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge ; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge. No right to erect another bridge

themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. 4 Pet. 514. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786. The time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company, must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnishing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties of that corporation. In the 7th section there is the following recital: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed, subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing, that the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated, might diminish the emoluments they had expected to receive from it. It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully con-

nected with this assertion of the right on the part of the State. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required, and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer from it the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the State, to make such a contract.

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws, never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.

And what would be the fruits of this doctrine of implied contracts on



the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question, involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.

Some questions, also, of a purely technical character, have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record, to bring out the great question in

contest; and it is the interest of all parties concerned, that the real controversy should be settled without further delay; and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding, in which the parties have brought it before the court.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

[McLEAN, J. delivered an opinion in favor of dismissing the bill for want of jurisdiction. STORY, J. delivered an opinion dissenting from the conclusions of TANEY, C. J. THOMPSON, J. concurred in the views of STORY, J. The following extracts are from the opinion of STORY, J.]

STORY, J. . . . It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king, and against the grantee. The rule is not disputed. But it is a rule of very limited application. To what cases does it apply? To such cases only where there is a real doubt; where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail, for the reason, (says the common law,) "that it will be more for the benefit of the subject, and the honor of the king, which is to be more regarded than his profit." Com. Dig. Grant, G. 12; 9 Co. R. 131, a; 10 Co. R. 67, b; 6 Co. R. 6. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced.

But what, I repeat, is most material to be stated, is, that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonour of the government, that it

should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract.

If, then, the present were the case of a royal grant, I should most strenuously contend, both upon principle and authority, that it was to receive a liberal, and not a strict, construction. I should so contend upon the plain intent of the charter, from its nature and objects, and from its burdens and duties. It is confessedly a case of contract, and not of bounty; a case of contract for a valuable consideration; for objects of public utility; to encourage enterprise; to advance the public convenience; and to secure a just remuneration for large outlays of private capital. What is there in such a grant of the crown, which should demand from any court of justice a narrow and strict interpretation of its terms?

The present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants, have, therefore, in reality, nothing to do with the case. We are to give this act of incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent; and that once ascertained, it is our duty to give it a full and liberal operation.

What solid ground is there to say, that the words of a grant in the mouth of a citizen, shall mean one thing, and in the mouth of the legislature shall mean another thing? That, in regard to the grant of a citizen, every word shall, in case of any question of interpretation or implication, be construed against him, and in regard to the grant of the government, every word shall be construed in its favor? That language shall be construed, not according to its natural import and implications from its own proper sense, and the objects of the instrument; but shall change its meaning, as it is spoken by the whole people, or by one of them? There may be very solid grounds to say, that neither grants nor charters ought to be extended beyond the fair reach of their words; and that no implications ought to be made which are not clearly deducible from the language and the nature and objects of the grant.

There is great virtue in particular phrases; and when it is once suggested, that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice, which grew up in former times from the gross abuses of the royal prerogatives; to which in America, there are no analogous authorities. But what is a monopoly, as understood in law? It is an exclusive right granted to a few, of something which was before of common right.

No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream, is a grant of a common right. Before such grant, had all the citizens of the State a right to erect bridges over navigable streams? Certainly they had not; and, therefore, the grant was no restriction of any common right. It was neither a monopoly; nor in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before; and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly, than the grant of the public stock or funds of a State for a valuable consideration. Even in cases of monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been to give them a favorable construction in support of the patent, as Lord Chief Justice Eyre said, *ut res magis valeat quam pereat*; *Boulton v. Bull*, 2 H. Bl. 463, 500.

Taking this to be a grant of a right to build a bridge over Charles River, in the place where the old ferry between Charlestown and Boston was then kept, (as is contended for by the defendants,) still it has, as all such grants must have, a fixed locality; and the same question meets us, is the grant confined to the mere right to erect a bridge on the proper spot, and to take toll of the passengers who may pass over it, without any exclusive franchise on either side of the local limits of the bridge? Or does it, by implication, include an exclusive franchise on each side, to an extent which shall shut out any injurious competition? In other words, does the grant still leave the legislature at liberty to erect other bridges on either side, free or with tolls, even in juxtaposition with the timbers and planks of this bridge? Or is there an implied obligation, on the part of the legislature, to abstain from all acts of this sort which shall impair or destroy the value of the grant? The defendants contend that the exclusive right of the plaintiffs extends no further than the planks and timbers of the bridge, and that the legislature is at full liberty to grant any new bridge, however near; and although it may take away a large portion, or even the whole of the travel which would otherwise pass over the bridge of the plaintiffs. And to this extent the defendants must contend; for their bridge is, to all intents and purposes, in a legal and practical sense, contiguous to that of the plaintiffs.

The argument of the defendants is, that the plaintiffs are to take nothing by implication. Either (say they) the exclusive grant extends only to the local limits of the bridge, or it extends the whole length of the river, or at least up to Old Cambridge bridge. The latter construction would be absurd and monstrous, and therefore the former must be the true one. Now, I utterly deny the alternatives involved in the dilemma. The right to build a bridge over a river, and to take toll, may well include an exclusive franchise beyond the local limits of

the bridge, and yet not extend through the whole course of the river, or even to any considerable distance on the river. There is no difficulty in common sense or in law in maintaining such a doctrine. But then, it is asked, what limits can be assigned to such a franchise? The answer is obvious; the grant carries with it an exclusive franchise to a reasonable distance on the river, so that the ordinary travel to the bridge shall not be diverted by any new bridge to the injury or ruin of the franchise. A new bridge which would be a nuisance to the old bridge, would be within the reach of its exclusive right. The question would not be so much as to the fact of distance, as it would be as to the fact of nuisance. There is nothing new in such expositions of incorporeal rights, and nothing new in thus administering, upon this foundation, remedies in regard thereto. The doctrine is coeval with the common law itself. Suppose an action is brought for shutting up the ancient lights belonging to a messuage, or for diverting a water-course, or for flowing back a stream, or for erecting a nuisance near a dwelling-house; the question in such cases is not a question of mere distance, of mere feet and inches, but of injury; permanent, real, and substantial injury, to be decided upon all the circumstances of the case.

But it is said that there is no prohibitory covenant in the charter, and no implications are to be made of any such prohibition. The proprietors are to stand upon the letter of their contract, and the maxim applies, *de non apparentibus et non existentibus, eadem est lex*. And yet it is conceded, that the legislature cannot revoke or resume this grant. Why not, I pray to know? There is no negative covenant in the charter; there is no express prohibition to be found there. The reason is plain. The prohibition arises by a natural, if not by necessary implication. It would be against the first principles of justice to presume that the legislature reserved a right to destroy its own grant. That was the doctrine of *Fletcher v. Peck*, 6 Cranch, 87, in this court, and in other cases turning upon the same great principle of political and constitutional duty and right. Can the legislature have power to do that indirectly which it cannot do directly? If it cannot take away or resume the franchise itself, can it take away its whole substance and value? If the law will create an implication that the legislature shall not resume its own grant, is it not equally as natural and as necessary an implication, that the legislature shall not do any act directly to prejudice its own grant or to destroy its value?

But then again, it is said, that all this rests upon implication, and not upon the words of the charter. I admit that it does; but I again say, that the implication is natural and necessary. It is indispensable to the proper effect of the grant. The franchise cannot subsist without it, at least for any valuable or practical purpose. What objection can there be to implications, if they arise from the very nature and objects

of the grant? If it be indispensable to the full enjoyment of the right to take toll, that it should be exclusive within certain limits, is it not just and reasonable, that it should be so construed? If the legislative power to erect a new bridge would annihilate a franchise already granted, is it not, unless expressly reserved, necessarily excluded by intendment of law? Can any reservations be raised by mere implication to defeat the operation of a grant, especially when such a reservation would be coextensive with the whole right granted, and amount to the reservation of a right to recall the whole grant?

The truth is, that the whole argument of the defendants turns upon an implied reservation of power in the legislature to defeat and destroy its own grant.

### THE BINGHAMTON BRIDGE.

[CHENANGO BRIDGE CO. *v.* BINGHAMTON BRIDGE CO.]

1865. 3 *Wallace U. S.* 51.<sup>1</sup>

ERROR to the New York Court of Appeals.

Bill in equity by Chenango Bridge Co. to enjoin Binghamton Bridge Co. The plaintiff company was chartered by Section 4 of the Act of 1808, "for the purpose of erecting and maintaining a toll-bridge across the Chenango River, at or near Chenango Point." The corporation was "to have perpetual succession, under all the provisions, regulations, restrictions, clauses and provisions of the before-mentioned Susquehanna Bridge Company," (referred to in Section 3 of the same Act of 1808.) The latter company was incorporated by Section 38 of the Act of 1805, which gave the Susquehanna Bridge Co. all the "powers, rights, privileges, immunities, and advantages," contained in the incorporation of the Delaware Bridge Co. by Section 31 of the same Act of 1805. Said Section 31 enacted: "It shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of Delaware River, within two miles either above or below the bridges to be erected and maintained in pursuance of this act." Soon after the passage of the Act of 1808, the plaintiff company built a toll-bridge across the Chenango River, at Chenango Point. In 1855, the legislature granted a charter to the Binghamton Bridge Co., purporting to authorize the building of a bridge in close proximity to that of the plaintiffs. The latter company built a bridge a few rods above the old one. The old company filed a bill in the Supreme Court of New York to enjoin the new company. The plaintiffs contended that the exclusive rights given by Section 31 of the

<sup>1</sup> Statement abridged. Arguments, and parts of opinions, omitted.—ED.

Act of 1805 to the Delaware Bridge Co. were imported by Section 38 of that Act into the charter of the Susquehanna Co. ; that these again, thus imported, were translated into Section 3 of the Act of 1808 ; and that these last were carried finally into Section 4 of the latter Act ; thus making a contract by the State with the Chenango Bridge Co., that no bridge should ever be built over the Chenango River within two miles of their bridge, either above or below it.

The answer denied the contract thus set up.

The Supreme Court of New York dismissed the bill ; and this decree was affirmed by the Court of Appeals.

*Mr. D. S. Dickenson*, for Binghamton Bridge Co.

*Mr. Mygatt*, *contra*.

Mr. Justice DAVIS delivered the opinion of the Court.<sup>1</sup>

The Constitution of the United States declares that no State shall pass any law impairing the obligation of contracts ; and the 25th section of the Judiciary Act provides, that the final judgment or decree of the highest court of a State, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were created a corporation by the legislature of that State, on the first of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge ; which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that the bridge is built and open for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States which says that no State shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case finally reached and was heard in the Court of Appeals, which is the highest court of law or equity of the State in which a decision of the suit could be had. And that court held that

<sup>1</sup> Nelson, J., not sitting, being indisposed.

the act, by virtue of which the Binghamton bridge was built, was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a State court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the Court of Appeals in New York.

The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over State adjudications is viewed with jealousy. If so, we say, in the words of Chief Justice Marshall, "that the course of the judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was, that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken.

A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, un-hinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government. An attempt even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College v. Woodward*,<sup>1</sup> which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the Chief Justice, in the *Dartmouth College* case, "that the objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on Government to provide for

<sup>1</sup> 4 Wheaton, 418.



them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: "If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill." Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

It is argued, as a reason why courts should not be rigid in enforcing the contracts made by States, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River bridge,<sup>1</sup> the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least

<sup>1</sup> 11 Peters, 544.

harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

[After considering the various N. Y. Acts in reference to Bridge Companies, and adopting substantially the construction contended for by plaintiffs, the opinion proceeds as follows:]

The legislature, therefore, contracted with this company, if they would build and maintain a safe and suitable bridge across the Chenango River at Chenango Point, for the accommodation of the public, they should have, in consideration for it, a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge, or establish any ferry, within a distance of two miles, on the Chenango River, either above or below their bridge.

Has the legislature of 1855 broken the contract, which the legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation."<sup>1</sup> As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," is, that the legislature *will not make it lawful* by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract

<sup>1</sup> Hargrave's Law Tracts, ch. ii. 16; The Enfield Toll Bridge Co. v. The Hartford and New Haven Railroad Co., 17 Connecticut, 63; Hooker v. Cummings, 20 Johnson, 100; Bowman v. Wathan, 2 McLean, 383.

which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the Constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

DECREE of the Court of Appeals of New York reversed, and a mandate ordered to issue, with directions to enter a judgment for the plaintiff in error, the Chenango Bridge Company, in conformity with this opinion.

[CHASE, C. J., delivered a dissenting opinion.]

CHASE, C. J., FIELD, J., and GRIER, J., dissented.

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### PARROTT v. CITY OF LAWRENCE ET ALS.

1872. 2 Dillon U. S. Circuit Court Reports, 332.<sup>1</sup>

MOTION to dissolve temporary injunction restraining the defendants, the Messrs. Wilson, from operating the ferry hereinafter described. Plaintiff is a citizen of Ohio, and a stockholder in the Lawrence Bridge Co. In his bill in equity, he alleges that the maintenance of the ferry infringes upon the rights of the Bridge Co.; and, to show his right to maintain the bill, alleges that the Bridge Co. and its officers have refused to proceed in the State courts to obtain redress.

Feb. 15, 1857, the Legislative Assembly of the Territory of Kansas incorporated the Lawrence Bridge Co.; granting the *exclusive* right and privilege of building and maintaining a bridge across the Kansas River, at the city of Lawrence for a period of twenty-one years; with power to establish and collect tolls.

Prior to said incorporation of the Bridge Co. the Legislative Assembly had, in 1855, granted to one Baldwin the exclusive right to establish a public ferry within two miles of Lawrence, for a term of fifteen years. The answer of some of the defendants alleges that Baldwin kept a ferry in the immediate vicinity of the bridge for some time after the erection of the bridge; when, for reasons unknown, he ceased to operate the ferry.

By the laws of Kansas, the county commissioners have the power to grant ferry licenses. In January, 1871, the commissioners licensed one Darling to keep a ferry, at Lawrence, for one year. The ferry was operated at first by Darling, and afterwards by the Wilsons, under an arrangement with the city of Lawrence, the city having purchased the ferry-boat of Darling. January 6, 1872, the commissioners granted to the defendant, Wilson, the right to keep and run a ferry on the Kansas River, at the city of Lawrence, for one year.

<sup>1</sup> Statement abridged. — Ed.

According to the bill, answer, and affidavits, it appears that the ferry-boat, or, as the bill styles it, the floating bridge, is operated in this way: Two ropes, or cables, are thrown across the river, fastened on each side, one of which is an endless chain. A rope is fastened to the upper side of the boat, or "floating bridge," and this rope glides upon the upper cable by means of a pulley attached to the other end of the rope, said pulley passing from side to side of the river with the boat, the motive power moving the boat back and forth across the stream being a stationary steam engine located on the north bank of the river. The boat itself is an ordinary flat-bottomed boat.

*Thacher & Banks*, and *N. T. Stephens*, for the complainant.

*Wilson Shannon*, for the Messrs. Wilson and the city of Lawrence.

DILLON, *Circuit Judge*. The grant to the bridge company by its charter is "the *exclusive* right and privilege of building and maintaining a *bridge* across the Kansas river at the city of Lawrence," and "to establish and collect tolls for *crossing said bridge*." If this right has not been invaded, the complainant is not entitled to an injunction against the running of the ferry. I say the *ferry*, for, in my judgment, it is clear that the means used to cross the river by the defendant, Wilson, — viz. a flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank — is a ferry, as distinguished from a bridge, both under the legislation of the State and according to the usual meaning of the word.

The passage over streams is generally effected in one of two ways, viz.: by bridges, which, as commonly constructed for the use of travellers and teams, are immovable structures or extensions of the highways over and across the water; and by boats, which are movable and propelled by steam-power, horse-power, the action of the current, or similar agencies. When the passage is by the latter mode it is called *ferrying*, which implies a boat that moves back and forth across the stream, from bank to bank. The legislation of Kansas everywhere recognizes this distinction between bridges and ferries. In the Statutes of 1855 there are provisions for building bridges (chap. 18), and also for regulating ferries (chap. 71). At the first session of the legislature, in 1855, there were a great many special acts, some authorizing certain persons to build toll-bridges, and others to establish and maintain ferries. Among these numerous acts was one giving to John Baldwin the exclusive right to keep a public ferry across the Kansas river at the town of Lawrence for the period of fifteen years. Two years afterwards the legislature incorporated the Lawrence Bridge Company, giving it the exclusive right to build and maintain a bridge across the river at the same place. Did this invade the franchise which had been granted to Baldwin? Clearly not, for the two grants are different; the one was to keep a ferry and collect tolls or ferriage for crossing the stream by this mode — the other was to erect and maintain a bridge, &c., "to collect tolls for crossing the same." So that during

the period for which Baldwin's ferry charter was to run, there were two modes of crossing the river at Lawrence expressly authorized, — the one by means of Baldwin's ferry, the other by means of the bridge of the Lawrence Bridge Company.

The contract of the legislature with the bridge company must be protected from subsequent invasion. But what was that contract? It was simply an exclusive right to build a bridge and to "collect tolls for crossing the same." It is argued that the contract with the bridge company was that the travel of a certain district, to-wit: those passing the river at Lawrence, should pass over this bridge and pay tolls therefor. But it is clear that such was not the contract: 1st, because it is not so expressed, or fairly to be implied from the language used; and, 2d, because the existence of the Baldwin ferry charter, which must be presumed to have been in the mind of the legislature when it passed the bridge charter, and which, by its terms, would continue in force many years after the period fixed for the completion of the bridge, shows that the legislature did not intend to make a contract with the bridge company to the effect that all persons and property crossing at Lawrence should pass over the bridge.

When we consider that legislative grants creating monopolies, while they are not to be cut down by hostile or strained constructions, are nevertheless not to be enlarged beyond the fair meaning of the language used (*Binghamton Bridge Case*, 3 Wall. 74), this conclusion seems, to my mind, so clear as not to admit of fair doubt.

It has been settled by adjudication that the exclusive right to a toll bridge is not infringed by the erection of an ordinary railroad bridge within the limits over which the exclusive right extended (*Mohawk Bridge Company v. Railroad Company*, 6 Paige, 564; *Bridge Proprietors v. Hoboken Co.* 1 Wall. 116, 150, and cases cited); and the reasoning upon which this conclusion rests shows that where the charter of the bridge company is silent upon the subject, its exclusive right would not be invaded by the establishment, under legislative authority, of a public ferry, although this would have the incidental effect to injure the value of the franchise of the bridge company. That this is the opinion of the presiding justice of this court is plain from an expression to that effect, by way of argument, in his opinion in the *Hoboken Bridge Case* (1 Wall. 116, 149). In that case the legislature of New Jersey, in 1790, authorized the making of a contract with certain persons for the building of a bridge over the Hackensack river, and by the same statute enacted that it should not be lawful for any person to erect "any other bridge over or across the said river for ninety-nine years;" and it was held that the railroad bridge subsequently authorized, which was so constructed as that persons or property could not pass over it except in railway cars, did not impair the legal rights of the bridge proprietors. Mr. Justice MILLER, in discussing the question as to what was the meaning of the Act of 1790 and the contract with the persons who built the bridge, says: "There

is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privileges for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by the defendants will infringe it. In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, *for there is no prohibition of ferries*, nor is it pretended that *they* would violate the contract." (1 Wall. 149.)

In conclusion I may remark, that I have considered the very ingenious argument made by the complainant's counsel to show that the mode adopted by the defendants for transporting persons and property across the river is not a ferry, but a flying bridge, or a floating bridge, and hence it is a violation of the franchise of the bridge company. But the single boat which is made to cross the river by steam-power, is not, in my judgment, a bridge of any kind, and certainly not a bridge within the meaning of legislation of the State of Kansas on the subject of bridges and ferries. It is argued, and perhaps with correctness, that the city of Lawrence transcended her powers in purchasing boats and in assisting Wilson to maintain his ferry under his license from the county authorities. But if this be granted, it falls far short of showing that the complainant is entitled, in consequence, to an injunction to prevent Wilson from running his ferry under his license.

DELAHAY, J., concurs.

*Injunction dissolved.*

## CHAPTER V.

POWERS USUALLY IMPLIED.<sup>1</sup>

## SECTION I.

*Power to Acquire Property by Purchase.*

## STOCKTON SAVINGS BANK v. STAPLES ET UX.

1893. 98 California, 189.<sup>2</sup>

VANCLIEF, C. Action to quiet title to an undivided half of a quarter section of land situated in the county of San Joaquin. The judgment was in favor of the plaintiff, and defendants have appealed therefrom, and from an order denying their motion for a new trial. Robert Coffee, who is admitted to have been the source of title, conveyed an undivided half of the quarter section to the defendant Mary P. Staples in March, 1870; and it is not disputed that she remained a tenant in common with him until the 2d day of June, 1875, at which time it is claimed by plaintiff that he ousted her, and thence maintained a continuous adverse possession of her interest until September 11, 1888, when he conveyed the whole quarter section to Alice L. Hudson, who continued the adverse possession until September 20, 1890, when she conveyed the entire quarter section to the plaintiff. This action was commenced October 15, 1890. The court found all the essential elements of a continuous adverse possession by Robert Coffee, Alice L. Hudson, and plaintiff, except notice to Mary P. Staples of its hostile character, from June 2, 1875, until the commencement of this action; and further found, substantially, that Mary P. Staples had actual notice of the adverse and hostile character of such possession from 1884 until the commencement of this action. Thus it appears that the title upon which plaintiff recovered was found to have been acquired by prescription.

<sup>1</sup> The subject of Corporate Powers is also discussed in various cases which are given under special topics treated of in subsequent chapters. — Ed.

<sup>2</sup> Only part of the opinion is given. — Ed.

Appellants contend that the court erred in overruling their objections to the introduction in evidence of the deed from Mrs. Hudson to plaintiff. The ground of the objection was that the plaintiff "was not shown to have the power to purchase, hold, or receive said land, nor that said land was conveyed to it for any of the purposes of the corporation." There was no evidence to show for what purpose the corporation had been organized, or what business it was conducting. The court found according to the allegation of the complaint, not denied in the answer, that at all the times stated the plaintiff "was a corporation duly organized and incorporated under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Stockton, county of San Joaquin, state of California." Under these circumstances I think it must be presumed (as against the defendants, at least) that the corporation had power to purchase and hold the land. *Mining Co. v. Clarkin*, 14 Cal. 545; *Evans v. Bailey*, 66 Cal. 112; *Hagar v. Board*, 47 Cal. 222; *People v. La Rue*, 67 Cal. 526; *Spel. Priv. Corp.* §§ 203, 206. It does not appear under what statute, or for what purpose, the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used. In answer to a similar objection in *People v. La Rue*, *supra*, it was said: "If there was anything in its charter, or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record; hence we deem the objection untenable."<sup>1</sup>

BELCHER C. and TEMPLE C. concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GAROUTTE J., PATERSON J., HARRISON J.

Hearing in Bank denied.

<sup>1</sup> In *People v. La Rue*, the passage above quoted is preceded by these sentences.

It is said by Angell & Ames on Corporations, at section 110, that "both by the laws of England and the United States, there are several powers and capacities which tacitly and without any express provision are considered inseparable from every corporation." Kyd enumerates five of these as necessarily and inseparably belonging to every corporation.

In enumerating them, the third in number is the right or power "to purchase lands and hold them for the benefit of themselves and their successors."

The presumption is that the corporation in question had the right to purchase and hold the lands by it represented.



## NICOLL v. NEW YORK &amp; ERIE R. R. CO.

1854. 12 *New York*, 121.<sup>1</sup>

EJECTMENT commenced in the supreme court in February, 1847, and tried at the Orange county circuit, held by Mr. Justice Edwards in October, 1848. The jury found a special verdict, from which it appeared that on the first day of July, 1836, Nicholas A. Dederer, being the owner in fee simple of a farm situate in Blooming Grove, Orange County, executed to the Hudson and Delaware Railroad Company a deed, dated that day, whereby, in consideration of the benefits and advantages to him of the railroad proposed to be made by the company, and of one dollar to him paid by the company, he granted to such company the privilege of surveying and laying out, by its agents and engineers, through his farm or tract of land, the route and site of its road; and also granted, bargained, sold, and conveyed unto the company and its successors, so much of the farm as might be selected and laid out by the company for the site of its railroad, six rods in width across the farm; provided always, and such grant was made upon the express condition, that the company should construct its railroad within the time prescribed by the act incorporating the same. That subsequently, and before the 27th of October, 1836, the company selected and laid out, for the site of its railroad through the farm, a strip of land six rods wide extending through the farm. That on the first of April, 1844, the farm formerly owned by Dederer, by virtue of sundry mesne conveyances, became the property of the plaintiff in fee simple, subject only to such right as the Hudson and Delaware Railroad Company then had to any portion thereof sufficient for the track of its road. That this company, on the 27th of October, 1836, commenced the construction of its railroad, but never completed or put in operation a double or single track, or any part thereof. That in pursuance of an act of the legislature, entitled an act authorizing the New York and Erie Railroad Company to construct a branch road, terminating at the village of Newburgh, passed April 8, 1845, the Hudson and Delaware Railroad Company were authorized to, and on the 14th of September, 1846, did execute to the defendant, the New York and Erie Railroad Company, a deed, and thereby for a valuable consideration granted, bargained, sold, and conveyed to the defendant and its successors, the maps, charts, drafts, surveys, and other personal property of the Hudson and Delaware Company, and all its rights, privileges, immunities and improvements, acquired under and by virtue of the original act of incorporation, or of any act amending it, or in any other manner; and also all the grants, lands, and real estate acquired by or ceded or conveyed to the Hudson and Delaware Company, and all its right, title, and interest to the same, and particularly the right of way, granted by

<sup>1</sup> Arguments omitted. — Ed.

Dederer to the company and its successors, by the deed from him above mentioned. That when this suit was commenced, on the 25th of February, 1847, the defendant had not completed or put in operation its branch road terminating at Newburgh, or any part of it, nor had it done so when the cause was tried. That on the 2d of December, 1846, the defendant entered upon the strip of land six rods wide, mentioned in the deed from Dederer and laid out by the Hudson and Delaware Company through his farm as the site of its road, and ejected the plaintiff therefrom, and that the defendant was still in the possession thereof. The suit was brought to recover possession of this strip of land from the defendant.

The justice before whom this cause was tried ordered judgment upon the special verdict in favor of the plaintiff. The defendant appealed, and the supreme court, sitting in general term in the 3d district, reversed the judgment and gave judgment in favor of the defendant. (*See* 12 *Barb.*, 460.) The plaintiff appealed to this court.

*E. L. Fancher*, for appellant.

*T. M. Kissock*, for respondent.

PARKER, J. The grant from Dederer to the Hudson and Delaware Railroad Company, bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant, there can be no doubt the Hudson and Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. (2 *Kent*, 281; *Co. Litt.*, 44 a, 300 b; 1 *Kyd on Corp.*, 76, 78, 108, 115; 3 *Pick.* 239.) And in this case the power was expressly conferred by the 9th section of the charter (*Sess. Laws of 1835*, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 *R. S.* 731), one of which is that of holding, purchasing and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant. (1 *R. S.*, 748, § 1.)

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years (*Laws of 1835*, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held, that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal.

Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute. (1 *R. S.*, 748, § 1.) The change made by the statute favors the grantee, where there are no express terms in the grant, by the presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms, defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual, without such words, conveyed only a life estate. For the same reason a grant, without such words, to a corporation aggregate (*Viners Ab., Estate, L. 3*), or to a mayor or commonalty (*ib.*, 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and, in their absence, we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant. (1 *R. S.*, 748, § 1.)

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law, that "no implication shall be allowed against an express estate limited by express words." (*Viner's Ab., Implication, A.*, 5; 1 *Salk.*, 236.)

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. (5 *Denio*, 389; 2 *Preston on Estates*, 50.) Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a deter-

minable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs;<sup>1</sup> but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. (2 *Kent*, 282; 5 *Denio*, 389; 1 *Comst. R.* 509.) Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson and Delaware Railroad Company then, by their grant from Dederer, took a title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent.

Kent says (4 *Kent*, 129): "Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates." They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them. (4 *Kent Com.* 122, 127; 2 *Black. Com.*, 154.) The plaintiff took his deed of the farm on the first of April, 1844. This was one year before the expiration of the time for constructing the road, and two years before the Hudson and Delaware Railroad Company conveyed to the defendants. At that time, therefore, there had been no breach of the condition; on the contrary, the right of the company was expressly recognized and reserved in the deed. Certainly, then, Dederer, when he conveyed, had no assignable interest.

[The concurring opinion of GARDINER, C. J., is omitted.]

*Judgment affirmed.*

<sup>1</sup> This view is now rejected. See *Bacon v. Robertson*, *post*; also *Gray on the Rule against Perpetuities*, §§ 44-51; and 2 *Kent's Com.* 307, note *b.* — Ed.

## SECTION II.

*Power to Acquire Property by Devise.*

## WHITE v. HOWARD.

1871. 38 Conn. 342.<sup>1</sup>

BILL IN EQUITY by the executors of the will of William Bostwick, praying for advice in the construction of the will. The residue, both real and personal, was devised to trustees, to be applied for the benefit of testator's daughter during her life. If the daughter should die leaving no husband or issue, a certain part of the trust fund was to be divided between six societies, of which the American Tract Society, a New York corporation, was one. The daughter died, leaving neither husband nor children. Counsel for the heirs-at-law of the testator contend that the American Tract Society is incapable of taking real estate in Connecticut by devise, and that the residuary clause must fail so far as it attempts to devise real estate in Connecticut to that corporation.

*H. White* and *J. S. Beach*, for petitioners.

*Doolittle* and *L. N. Bristol*, for heirs of testator.

*D. B. Beach*, for heirs of daughter.

*J. W. Edmunds*, *Cook*, *Campbell*, *G. N. Titus*, *T. Westervelt*,  
*A. L. Edwards*, *S. E. Baldwin*, for various Societies.

FOSTER J.

It is asserted that the American Tract Society can take neither real or personal property under this will. That it cannot take real, because its charter of incorporation, granted by the state of New York, does not confer the power of taking by devise; that it cannot take personal, because the charter provides that the net income of said society arising from real and personal estate shall not exceed the sum of \$10,000 annually. This limit it is claimed has been reached and exceeded, and so the capacity of the society to take property is exhausted. This society was incorporated by a special act of the legislature of the state of New York, passed May 26, 1841. The third section of its charter provides that the corporation shall possess the general powers, and be subject to the provisions, contained in title 3d of chapter 18 of the first part of the revised statutes, so far as the same are applicable and have not been repealed. The title and chapter referred to enumerate the powers of corporations, and the clause which bears directly upon this subject reads thus: "to hold, purchase, and convey such real and personal

<sup>1</sup> Statement abridged. Only so much of the opinion is given as relates to one point. Arguments omitted.—Ed.

estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." This charter was amended by the legislature of New York on the 31st of March, 1866, but as this was after the death both of the testator and of his daughter, that amendment need not be particularly considered, as it cannot materially affect the question involved. Now it is manifest that this corporation has express power by its charter to hold, purchase and convey real and personal estate, for specified purposes and to a limited amount. There is no express power to take by devise, nor is the power so to take expressly prohibited. We suppose there could be no doubt that this corporation could take by devise in New York, if the Statute of Wills of that state empowered corporations generally to take in that manner. The English Statute of Wills, passed in the time of Henry VIII, authorized every person having a sole estate in fee simple of any manors &c., "to give, dispose, will, or devise, to any person or persons, *except to bodies politic and corporate*, by his last will and testament in writing, or otherwise by any acts lawfully executed in his lifetime, all his manors &c., at his own will and pleasure, any law, statute, custom, or other thing theretofore had, made, or used to the contrary notwithstanding." Thus corporations, by express exception in these statutes, were not enabled to take lands directly by devise in England, and the Statute of Wills of the state of New York makes the same exception. By that statute it is enacted, that all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate by a last will and testament duly executed &c. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." 3 N. Y. Rev. Stat., 138, (5th ed.). This corporation therefore, prior to the recent amendment of its charter, could not take by devise in New York,<sup>1</sup> and such is the decision of their Supreme Court and Court of Appeals in this very case. And so it is earnestly contended that it cannot take by devise in Connecticut. We yield readily to the doctrine laid down in this connection in regard to corporations; indeed it is too thoroughly established to be doubted or questioned. That doctrine perhaps is nowhere better stated than in the case of *Head v. Providence Ins. Co.*, 2 Cranch, 127, by the then illustrious head of the Supreme Court of the United States, the late Chief Justice MARSHALL. "It [a corporation] may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Now this corporation stands at the bar of this court claiming the right to take lands within

<sup>1</sup> Corporations "always had the right at common law to take personal property by bequest; . . . and I entertain no doubt that they have that right under our statutes." WRIGHT, J., in *Sherwood v. Am. Bible Society*, 4 Abbott, N. Y. App. Dec. 227, p. 231. — ED.

our territory by devise. It is clothed with such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase, and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore not in Connecticut, say the counsel for the heirs at law, for being a New York corporation, and by the law of that state devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not so arise. There is no prohibition in the charter; the inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a state, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut.

The state of New York has partially adopted the policy of England in regard to devises to corporations, though the English statutes, usually called the statutes of mortmain, have not been reenacted in that state. Those statutes began with *Magna Charta*, in 9 Henry III, and embrace a succession of acts down to and including 9 George II. They were intended to check the ecclesiastics of the Roman church from absorbing in perpetuity, in dead clutch, all the lands of the kingdom, and so withdrawing them from public and feudal charges. *Shelford on Mortmain*, 2. By the statute of 43 Eliz., ch. 4, known as the Statute of Charitable Uses, lands may be devised to a corporation for a charitable use, and the court of chancery will support and enforce such devises. Whether a court of equity has power to execute and enforce such trusts, as charities, independent of any statute, is a question which has been much discussed, and very high authorities can be quoted both in favor and against the exercise of such a power. We think the latter and better opinion to be in favor of an original and necessary jurisdiction in courts of equity as to devises in trust for charitable purposes, when the general object is sufficiently certain, and not contrary to any positive rule of law. It is unnecessary however to decide this question, for in this state we have no statutes of mortmain; no exception in our Statute of Wills prohibiting corporations from taking by devise; aliens, resident in this state or in any of the United States, may purchase, hold, inherit, or transmit real estate, in as full and ample a manner as

native born citizens; their wives are entitled to dower; their children and other lineal descendants may inherit; and we have besides a statute, passed in our colonial days in 1702, in effect reënacting the statute of 43 Elizabeth, and containing indeed more liberal and comprehensive provisions to sustain devises of this description than are contained in the 43 Elizabeth. That act provides, that "all lands, tenements, or other estates, that have been or shall be given or granted by the General Assembly, or any town or particular person, for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantor, and to no other use whatever."

We therefore entertain no doubt that the American Tract Society can take by devise in this state. As to the other objection, that having an income greater in amount than is allowed by its charter it has exhausted its power to take, it suffices to say that no such fact is found by the very competent committee whose report is on the record.

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### SECTION III.

#### *Power to Alienate. Power to Mortgage.*

1 KYD ON CORPORATIONS, 1st ed., A. D. 1793, pp. 107, 108. Having considered the capacity of corporations to *take* property, we are naturally led, in the next place, to treat of the power they have to *dispose* of it.

All *civil* corporations, such as the corporations of mayor and commonalty, bailiffs and burgesses of a town; or the corporate companies of trades in cities and towns, and all corporations established by act of parliament for some specific purpose, unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had an unlimited control over their respective properties, and may alienate in fee, or make what estates they please for years, for life, or in tail, as fully as any individual may do with respect to his own property.



## AURORA, &amp;c. SOCIETY v. PADDOCK.

1875. 80 *Illinois*, 264.<sup>1</sup>

CRAIG, J. This was a bill in equity, brought by appellees, to foreclose a mortgage executed by the Aurora Agricultural and Horticultural Society of Aurora, on the 28th day of December, 1870, to secure the payment of \$6000 loaned by John R. Coulter to the society. The court, on a hearing of the cause, rendered a decree directing a sale of the mortgaged premises in satisfaction of the mortgaged debt.

The society has prosecuted this appeal, and in order to obtain a reversal of the decree, it is insisted by the counsel for appellant :

*First* — That the society had no power whatever to mortgage.

*Second* — That the mortgage in question was wholly unauthorized.

The appellant was organized on the 6th day of March, 1869, under an act approved Feb. 15, 1855, which authorized the incorporation of agricultural societies. (Gross' Statutes, 1869, page 119.) By the third section of the act, the society was made a body corporate, with power to sue and be sued, to acquire and hold real estate not exceeding five hundred acres, to construct the necessary improvements and buildings for its purpose, to have and employ capital, machinery, live stock, etc., not exceeding in value \$10,000.

While it is true, no section of the act confers direct authority upon the society to sell or mortgage its property, except upon a dissolution of the corporation, yet the act does not prohibit or restrict the society from selling or giving a mortgage upon its real estate. The power to mortgage, when not expressly given or denied, must be regarded as an incident to the power to acquire and hold real estate and make contracts.

We understand it to be the common law rule, that corporations have an incidental right to alien or dispose of their lands and personal property, unless specially restrained by the act under which they are organized or by statute.

It is said in Angell & Ames on Corporations, p. 153 : "Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects nor circumscribed as to quantity." The same doctrine is clearly laid down by Kent, vol. 2, page 280.

We are, therefore, of opinion, as the society was not prohibited from mortgaging its lands, it possessed the power to do so as an incident to the power to purchase and hold real estate and make contracts.

Decree affirmed.

<sup>1</sup> Statement, and part of opinion, omitted. — ED.

## COMMONWEALTH v. SMITH ET ALS.

1865. 10 *Allen (Mass.)*, 449.

BILL IN EQUITY seeking to impeach the validity of a mortgage, executed on the 30th of July 1855 by the Troy and Greenfield Railroad Company to the defendants as trustees, covering by its terms the franchise, railroad, and all other property of the corporation, then owned or thereafter to be acquired, to secure bonds to the amount of \$900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. This mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the Commonwealth to secure state bonds to the amount of \$2,000,000, which the Commonwealth were to issue under the provisions of *St.* 1854, c. 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the Commonwealth have received two other mortgages upon the railroad and franchise of the Troy and Greenfield Railroad Company, one of which was dated on the 6th of July 1860, and the other on the 5th of March, 1862; and also a surrender from the corporation of all their property subject to redemption under *St.* 1862, c. 156. On the 4th of September 1862 the Commonwealth took possession of the mortgaged premises in various towns, for breach of condition, in the manner shown by various certificates thereof, which are now immaterial. The Commonwealth under their various mortgages have at various times, from October 1858 to July 1861, advanced to the Troy and Greenfield Railroad Company, large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to the defendants, have at various times, from August 1855 to July 1861, issued bonds to the amount in all of \$600,000, payable in thirty years from date. All of these bonds were issued in good faith, and are held by *bona fide* holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the Commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The amount of capital stock of the corporation which, in December 1856, had been paid in was \$143,905.77.

Upon these facts, and others which are now immaterial, the case was reserved by the chief justice for the determination of the whole court.

*D. Foster*, for the Commonwealth. The mortgage to the defendants has never been sanctioned or ratified by the legislature, and its validity must depend on the question whether the common law powers of railroad corporations in Massachusetts permit them to execute mortgages, and if so to what extent. At common law, a railroad corporation has no power

to execute any mortgage. This is clearly the English rule. *Winch v. Birkenhead, &c. Railway*, 7 Railw. & Canal Cas. 384. *Beman v. Rufford*, Ib. 48. *South Yorkshire Railway, &c. v. Great Northern Railway*, 9 Exch. 84. *Shrewsbury, &c. Railway v. North Western Railway*, 6 H. L. Cas. 113. It is also the prevailing opinion in this country. *Pierce v. Emery*, 32 N. H. 504. *Hall v. Sullivan Railroad*, 21 Law Reporter, 138. *Tippets v. Walker*, 4 Mass. 595. *Gue v. Tide Water Canal Co.* 24 How. 257. *Worcester v. Western Railroad*, 4 Met. 564. *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 404. *Opinion of Justices*, 9 Cush. 611. *Salem Mill Dam v. Ropes*, 6 Pick. 32. The statutes of Massachusetts confer no such authority. *St.* 1854, c. 286. Gen. Sts. c. 63, §§ 120-123.

[Remainder of argument omitted.]

*S. Bartlett & C Allen*, for the defendants. Even if it be conceded that the franchise to be a corporation and the delegated right of eminent domain are inalienable, there is nothing in the nature of a franchise to operate a railroad which is of that character. A corporation enters into no contract with the state that it will go on and act under its charter. The security of the state is founded upon the rules which it prescribes and the restrictions which it imposes and the power which it reserves to repeal or alter at will; and upon the power which resides in courts to enforce the due execution of the powers which are granted, or exact forfeitures in case of abuse. It is quite immaterial what persons may compose the corporation; the individuals may all change, but the same duties will rest upon the corporation. The great weight of American authority is in favor of the existence of this power. *Morrill v. Noyes*, 3 Amer. Law Reg. (N. S.) 18. *Miller v. Rutland, &c. Railroad*, 36 Verm. 452, and cases cited. *Platt v. New York, &c. Railroad*, 26 Conn. 544. *Hall v. Sullivan Railroad*, 21 Law Reporter, 138. *Bowman v. Watken*, 2 McLean, 393, 394. *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515. *Dinsmore v. Racine, &c. Railroad*, 12 Wisconsin, 649. *Macon, &c. Railroad v. Parker*, 9 Georgia, 377. *Pollard v. Maddox*, 28 Alab. 321. *Allen v. Montgomery Railroad*, 11 Alab. 454. The course of legislation in Massachusetts has recognized this as a common law power. *Sts.* 1857, c. 178, §§ 1, 5; 1854, c. 423; c. 286, § 3; 1841, c. 44; Rev. Sts. c. 39, § 83; c. 44, § 11, *et seq.* The validity of a conveyance executed by full authority of a corporation, cannot be questioned by third parties, on the ground that the corporation itself had no authority to execute it. Although a corporation has exceeded its authority, yet the question cannot be tried collaterally, but it is a matter between the corporation and the state. In this case, the Commonwealth stands in the attitude of an individual. The corporation itself, while retaining the consideration could not maintain a bill in equity to escape from its contracts and conveyance. *Chester Glass Co. v. Dewey*, 16 Mass. 102, and cases cited. *Parish v. Wheeler*, 22 N. Y. 502. The Commonwealth, taking only a quitclaim title, take subject to all equities of which they have

notice. They succeed to the rights of the corporation and to no more. To hold that the Commonwealth can question this conveyance would be to hold that they have greater rights than their grantor had. This cannot be. *Parker v. Nightingale*, 6 Allen, 344, 345. *Joslyn v. Wyman*, 5 Allen, 62. *Taylor v. Dean*, 7 Allen, 251. *Vermont, &c. Railroad v. Vermont Central Railroad*, 34 Verm. 1. *Morrill v. Noyes*, *ubi supra*. *Silver Lake Bank v. North*, 4 Johns. Ch. 370.

[Remainder of argument omitted.]

HOAR J. The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity against the Commonwealth requires the court to give a construction to the provisions of *St. 1854, c. 286*. To ascertain what the legislature intended to authorize or prohibit by that statute, it will be expedient first to consider what were the powers of railroad companies in relation to the issue of bonds and the making of mortgages at common law, or before the statute was enacted.

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter." *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 404.

But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable

from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure.

The whole reasoning of the court in the case of *Whittenton Mills v. Upton*, 10 Gray, 582, in which it was held that a manufacturing corporation has no power to make a contract of co-partnership applies with much greater force to the transfer of its franchise by a railroad company.

No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this commonwealth, where there was not express legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that it would not otherwise exist, and afford a solution of the allusion to railroad mortgages which occurs in the statutes.

[The learned Judge then held, that the issue of bonds was in contravention of Statute 1854, chapter 286; and said that "the bonds being invalid, the mortgage to secure them is invalid likewise." The opinion concludes as follows:]

We find no evidence that the Commonwealth has ever known and sanctioned the irregular and illegal issue of the bonds in question, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the Commonwealth gives it a direct interest in the property, and, not being made expressly subject to any prior incumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void.

The result to which the point decided leads is this: that, the defendants having no title which they can maintain against either of the mortgages to the Commonwealth, the plaintiffs have a plain, complete and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed.

## PLYMOUTH R. R. CO. v. COLWELL ET AL.

1861. 39 Pa. State, 337.<sup>1</sup>

ERROR to the Common Pleas of Montgomery County.

Ejectment against Stephen Colwell and Susanna Jacoby, for a lot of ground, "containing about two acres of land, or thereabouts."

In 1836, plaintiffs were incorporated as a railroad company. In 1837, they bought of Lukens a farm of 40 acres and 104 perches, through which their road was to pass. They built across this land a railroad, suitable only for horse power. In 1841, they sold to Freedly and others 38 acres and 130 perches of the Lukens farm, retaining only 1 acre and 134 perches, the premises now in dispute. In 1844, this retained lot was sold at sheriff's sale, on a judgment of Leedom against the company. The levy and sale described the premises as "two acres more or less, on a part of which is the Plymouth Basin, and the Plymouth Railroad passes across said lot, subject to the corporate franchises of the said Plymouth Railroad Company over a part of said lot if any they have." In 1849, Freedly conveyed part of the premises to Colwell; and Freedly's executors, in 1853, conveyed the residue to Susanna Jacoby. There was a "basin" on the Lukens farm before the company bought. After their purchase, the company deepened the basin, so as to accommodate canal-boats brought in there to receive freight from the railroad. The company insisted on their right to retain the basin for this purpose; and they claimed the rest of the ground for the tracks of their road, for depots, engine-houses, &c.

The case was tried upon the issue formed by the usual plea of "not guilty," and resulted in a verdict and judgment for defendants; whereupon plaintiffs brought error.

It appeared, on the argument, that the land for which Colwell defended was not within the description of plaintiffs' declaration.

*D. H. Mulvany*, for plaintiffs.

*H. M. Miller*, and *James Boyd*, for defendants.

WOODWARD, J. [After stating the facts.] What was the effect of the sheriff's sale on the company's title? They had very express authority by the incorporating law to buy, hold, mortgage, and sell lands; and in locating their road they probably found it expedient to buy the Lukens farm, rather than pay damages for crossing it. This is often the true policy of railroad companies. But lands so bought, and not actually dedicated to corporate purposes, are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff in the same manner and with the same effect as the lands of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise

<sup>1</sup> Statement abridged. Portions of opinion omitted. — ED.

of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration: 9 W. & S. 28. And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For, the corporation would cease to exist for the purposes of its institution, when its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being, after the ground on which its rails rest had been sold to a stranger. If such is in general the law of corporate tenures which are essential to corporate functions, it is peculiarly the law of this case where Freedly took his title from the sheriff, expressly subject to the franchises of the Plymouth Railroad Company.

Then what are the franchises of this company? Do they include a right to the basin for purposes of navigation?

. . . A canal-basin is not a legitimate incident of a railroad having no authorized canal connection. Neither, therefore, under the general principles of law, nor the particular qualification expressed in the sheriff's deed to Freedly, was this basin held as an appurtenant of the railroad, and hence a valid title passed by the sheriff's sale to Freedly, and through him to Mrs. Jacoby.

But the whole lot was sold, and included the very bed of the road, as well as the ground that was needed for a depot and other buildings. As to such portions of the lot as were occupied or appropriated for these purposes, no title passed to Freedly, and none, of course, vested in Mrs. Jacoby. Yet she having taken defence for the whole, the verdict ought to have distinguished what was lawfully appurtenant to the road, and what was not. The company must be protected in the possession of all that is really essential to the enjoyment of their franchise.

Their charter authorizes them to appropriate four rods in width, and limits them to that, except in deep cuts and fillings, or at points selected for depots, or engine or water stations. It evidently contemplated a

locomotive road, and it gave them five years to complete it, "according to the true intent and meaning of this act." In ascertaining the necessary appurtenances of the road, regard is to be had to this limitation of time, for the appropriations of ground were to be all made within that time.

These seem to us to be the principles on which this cause ought to have been decided. Most of them were observed by the learned judge in his rulings; but what portion of the ground had become appurtenant to the road by appropriation such as we have described, was a question of fact which ought to have been submitted to the jury. And there was some evidence on the point in the admitted portions of Carson's depositions. If there ever was any appropriation made by stakes or fences, or other acts on the ground, the company ought to be able to show it by the most irrefragable proof. The assignments of error, founded on bills of exception to evidence, were apparently made in studious disregard of the rules prescribed in 6 Harris 568, especially Rule viii.; but still, we have gone through them as well as we could, and neither in them nor in the answers to the points propounded, do we see any other ground for reversing the judgment than the failure to submit to the jury the question how much of the ground in dispute the company had actually appropriated to the lawful purposes of their corporation.

The judgment is reversed, and a *venire facias de novo* is awarded as to Susanna Jacoby, and judgment affirmed as to Stephen Colwell.

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#### SECTION IV.

*Power to Borrow Money. Power to issue Negotiable Notes.*

#### BRADBURY v. BOSTON CANOE CLUB.

1891. 153 Massachusetts, 77.

HOLMES, J. This is an action upon a promissory note for one hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff.



The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Pub. Sts. c. 115, § 2, for encouraging athletic exercises. By § 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of § 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See *Fay v. Noble*, 12 Cush. 1, 18; *Morville v. American Tract Society*, 123 Mass. 129, 136; *Davis v. Old Colony Railroad*, 131 Mass. 258, 271, 275. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others.

*Judgment for the plaintiff.*

*C. J. McIntire & F. Hunt*, for the plaintiff.

*C. H. Sprague*, for the defendant.

# BATEMAN v. MID-WALES RAILWAY CO.

NATIONAL, &C., CO. v. SAME.

OVEREND, GURNEY, & CO. (LIMITED) v. SAME.<sup>1</sup>

1866. *Law Reports*, 1 *Common Pleas*, 499.

THESE were actions brought by the respective plaintiffs against the defendants, a railway company, incorporated under the 22 & 23 Vict. c. lxxiii., the 5th section of which prescribed the limit of their capital (170,000*l.*), and the 7th and 9th the mode of raising it; the 37th and 38th empowered them to contract for working the traffic upon the railway, and the 1st section incorporated the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); but there was no provision in terms empowering them to draw, accept, or indorse bills of exchange or promissory notes.)

The declaration in each case charged the company as the acceptors of several bills of exchange, drawn respectively by John Watson & Co.,

<sup>1</sup> Arguments omitted; also the concurring opinions of BYLES J., and KEATING J.  
—ED.

and purporting to be accepted in the following form: — “Accepted by order of the board of directors, and payable at the Agra and Masterman’s Bank. John Wade, secretary,” with the seal of the company annexed. It was proved (or admitted) in each case, that the company had actually commenced business as a railway company, and that there was a resolution of a board of directors authorizing the acceptance of the bills in question, as above.

Under the plea traversing the acceptance, it was contended on the part of the defendants, at the trial before Erle, C. J., at the sittings in London after last Hilary Term, that the company had no power by law to accept bills of exchange; and further, that, assuming that they had such power, the bills declared on were not accepted in such form as to be binding on them.

His Lordship directed verdicts to be entered for the plaintiffs in each action, reserving leave to the defendants to move to enter nonsuits if the Court should think the objections or either of them well founded.

*Karslake, Q.C.*, obtained rules *nisi*.

*E. James, Q.C.*, and *Sir G. Honyman*, for plaintiffs in first and second actions.

*Karslake, Q.C.*, and *Holland*, for the defendants.

*Bovill, Q.C.*, and *Mathew*, for plaintiffs in third action.

ERLE, C.J. These were actions by the indorsees against the acceptors of several bills of exchange. The defendants pleaded in each action that they did not accept. It appeared that the defendants are a company incorporated by an act of 22 & 23 Vict. c. lxiii. for the purpose of making and working a railway in Wales. The precise purposes for which they are incorporated, and the powers which are intrusted to them, are limited and defined by the special act and the provisions of the general acts incorporated therewith. I take it to be well established that a corporation established for a specific purpose cannot bind itself by a contract which is entirely unconnected with the purposes of its incorporation. The question then is, whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad, — or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by

an indorsee, but in respect of the latter not. So much for the general bearing of the question upon principle. How stands the matter as to authority? Subject to three exceptions, I find no case in which an action upon a bill of exchange or promissory note has been sustained against a corporation: and these exceptions prove the rule. In *Slark v. Highgate Archway Company*,<sup>1</sup> the company was empowered by its act of parliament to accept bills for the specific purpose: and in the cases of the Bank of England and the East India Company, the negotiation of bills and notes was within the very scope and object of their incorporation. In no other case that I am aware of has the liability of a corporation ever been enforced. In *Broughton v. Manchester Waterworks Company*,<sup>2</sup> the doctrine I have stated is laid down in general terms: and Bayley, J., entertained a doubt whether the holder of a bill of exchange accepted by a corporation could sue the corporation without shewing that the acceptance was given for a purpose for which it was competent to the corporation to accept. That proposition derives much more force when applied to the case of a corporation created for a specific purpose, as we have judicial notice from the act of parliament that this is. Upon both principle and authority, therefore, I am of opinion that the acceptances given by this company are not binding acceptances, and that the plea is established.

MONTAGUE SMITH, J. I am of the same opinion. The plaintiffs are indorsees, and not immediate parties to these bills, and therefore cannot recover unless the bills are in their inception valid instruments. I am clearly of opinion that it was not within the competency of this company to accept bills. It is a company incorporated for the formation of a railway, with a limited capital and limited powers of borrowing money. If such a company had power to accept bills of exchange, the consequence would be either that they might bind themselves by acceptances to an unlimited extent, or there must in each case be an inquiry whether the bill was given for the payment of a just debt, or for a purpose not warranted by their incorporation. I think that it was not the intention of the legislature that they should accept bills at all. The shareholders advance their money upon the faith of the limited borrowing powers. This limit would be illusory if the directors could be held bound by acceptances. There is no authority to shew that they have power to accept, and there is much authority in analogous cases the other way. It has been held that mining companies, waterworks companies, gas companies, salt and alkali companies, and many others, all more in the nature of trading companies than this company, are incapable of drawing, accepting, or indorsing bills of exchange. The first object of a railway is the making of a railway, though they may and practically always do carry on the business of carriers. That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the pri-

<sup>1</sup> 5 Taunt. 792.

<sup>2</sup> 3 B. & A. 1.

mary object of the incorporation is the carrying on of trade as other persons carry it on, viz. by buying and selling. In addition to the cases already referred to, there is the distinct authority of many eminent text-writers that a railway company cannot accept. I will refer to one considerable authority, the late J. W. Smith. In his treatise on Mercantile Law, after speaking of the disability of corporations in general to accept bills he says: <sup>1</sup> "However, it has been considered that a trading corporation may differ from others as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence." No express power to accept is given to this company: nor is there, in my judgment, any necessary implication from the purposes for which it was created. For these reasons, I am of opinion that the rule in each of these actions should be made absolute. *Rules absolute to enter a nonsuit.*

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### UNION BANK v. JACOBS.

1845. 6 *Humphrey (Tennessee)*, 515.<sup>2</sup>

Surr against Jacobs, as endorser of the negotiable note of the Hiwassee Rail Road Company.

By Act of the Tennessee Legislature, in 1835-6, the Hiwassee R. R. Co. was created a body corporate, with perpetual succession, with power to sue and be sued, and to possess and enjoy all the rights, privileges and immunities, with power to make such by-laws, ordinances, rules, and regulations, not inconsistent with the laws of this State and the United States, as shall be necessary to the well ordering and conducting the affairs of said company.

By the 2d section, the capital stock was declared to be \$600,000, and the corporate powers were to commence when \$400,000 were subscribed.

By the 4th section, after 4000 shares shall have been subscribed, there was to be paid on each share such sum as the company might direct, and in such instalment, not exceeding one fourth of the subscriptions in any one year.

By the 12th section, if the capital stock of the company be found insufficient for the purposes of the road, the company may enlarge it from time to time, so as not to exceed in the whole \$1,500,000, and new subscriptions for that purpose to be opened.

<sup>1</sup> 7th ed. by Dowdeswell, pp. 105-6.

<sup>2</sup> Statement abridged. — ED.

By the 13th section, the president and directors are invested with all the powers and rights necessary for the building, constructing, and keeping in repair of the railroad; and they may cause to be made, or contract with others for making of said road or any part thereof.

Under the provisions of the charter, the company was legally organized and proceeded to construct the road. The company became indebted to Lonergin, a contractor, for grading the road, in the sum of \$5000. For the payment of this debt, the company, by its president, Jacobs, executed its promissory note to Jacobs, negotiable and payable at the Union Bank four months after date. The note was indorsed by Jacobs to Trautwine, and by him to the Union Bank, and the proceeds were passed by the bank to the credit of Lonergin. At maturity the note was protested, and notice given to the endorers. Suit was brought against Jacobs as endorser. The circuit Judge charged the jury "that the note was drawn by the Hiwassee Rail Road Company in violation of its corporate powers; that it was therefore null and void; and that the plaintiffs were not entitled to recover."<sup>1</sup>

*Verdict for defendant, and judgment. Plaintiff brought error.*

*Lyon*, for plaintiff.

*W. Swan, Maynard, and Sneed*, for defendant.

TURLEY, J. [After stating the facts.] It is contended against the plaintiff's right to recover, that there is no power given, either expressly or by necessary implication, by the charter to the Hiwassee Rail Road Company, to borrow money or to execute promissory notes; and that, therefore, the note executed and endorsed to the Bank is void, both as against the maker and endorers, and that no action can be maintained against them thereon.

The construction of the powers of corporations has been a fruitful source of litigation, both in the courts of Great Britain and the United States. In the earlier cases they were construed with great strictness, and a stringent rule, as to the mode of exercising them enforced. Mr. Story, in the case of the Bank of Columbia *vs.* Patterson, Adm'r, 7th Cranch, 305, says: "Anciently it seems to have been held that corporations could not do any thing without deed — 13th H. 8, 12; 4th H. 7, 6; 7th H. 7, 7, 9. Afterwards, the rule seems to have been relaxed, and they were for convenience sake permitted to act in ordinary matters without deed, as to retain a servant, cook, or butler — Plow. 91; 2d Saunders 395 — and gradually this relaxation widened to embrace other objects — Bro. Corp. 51; 3rd Salk. 191; 3d. Lev. 107. At length, it seems to have been established, that, though they could not contract directly except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts within the scope of his authority

<sup>1</sup> The above is the charge as recited in the opinion of the Supreme Court. The statement by the reporter says that the Judge charged "that the Hiwassee Company had no power to borrow money, and that the note given in execution of a void contract was null and void also." — Ed.

would be binding on the corporation — 3d P. Wms. 419 ; and courts of equity, in this respect, seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal — 1st Fonblanque's Equity 305. This technical doctrine has in more modern times been entirely broken down." The same Judge, in continuation in the same case, observes : " The doctrine that a corporation could not contract except under its seal, or in other words, could not make a promise, if it had ever been fully settled, must have been productive of great mischief. Indeed, as soon as the doctrine was established, that its regularly appointed agents could contract in their name without seal, it was impossible to support it ; for, otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation ; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action may well lie — 3rd Bro. Ch. Rep. 262 ; Douglass 524 ; 3rd Mass. Rep. 364 ; 5th Mass. 89, 491 ; 6th Mass. 50. Whatever of strictness may have existed in the earlier cases, in restricting their power of contracting to the express grant of authority, has been also greatly relaxed, and the doctrine upon the subject been made more conformable to reason and necessity, the powers granted to corporations being now construed like all other grants of power, not according to the letter, but the spirit and meaning. In Angell & Ames on corporations, page 192, sec. 12, it is said, " a corporation having been created for a specific purpose, can not only make no contracts forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract ; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or, whether the contract is entirely foreign to that purpose. In general, an express authority is not indispensable to confer upon a corporation the right to become drawer, endorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient, if it be implied as the usual and proper means to accomplish the purposes of the charter. — Chitty on Bills, 5th Ed. 17 to 21 ; Baily on Bills, ch. 2, sec. 7, p. 69 (5th Ed.) Story on Bills of Exchange, sec. 79, p. 94. In the case of *Mum. vs. Commission, Co.* 15th Johnson 52, Spencer, J., who delivered the opinion of

the court, says: "It has been strongly urged, that, under the act incorporating this company, they could neither draw nor accept bills of exchange. Their power is undoubtedly limited; they are required to employ their stock solely in advancing money, when required, on goods and articles manufactured in the United States, and the sale of such goods and articles on commission. The acceptance of a bill is an engagement to pay money; and the company may agree to pay or advance money at a future day, and they may engage to do this by the acceptance of a bill. When a charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose, implies a power to use the necessary and usual means to effectuate that purpose. — Angell & Ames on Corp. 200, sec. 3.

Mr. Story, in his treatise on bills of exchange, p. 95, speaking of the power of corporations to draw, endorse, and accept bills of exchange, says: "it is sufficient if it be implied as a usual and appropriate means to accomplish the objects and purposes of the charter. But when the drawing, indorsing or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, then the act becomes a nullity, and not binding on the corporation."

In the case of the *People vs. the Utica In. Co.*, 15th Johns., Thompson, Chief J., who delivered the opinion of the court, says, at page 383, "an incorporated company has no rights but such as are specially granted, and those that are necessary to carry into effect the powers so granted."

In the case of *Mott vs. Hicks*, a quantity of wood was purchased for the president and directors of the Woodstock Glass Company, by Whitehead Hicks, the president thereof, for which he executed the promissory note of the company at six months. It appears, from a reference in argument to the charter of the company, that there was no clause authorizing it to issue bills or notes, or making such, if issued, binding and obligatory upon the company; yet it was held by the court, that an action would lie against the corporation upon the note, it having been executed by its legally authorized agent, acting within the scope of the legitimate purposes of such corporation. — 1st Cowen 513.

In the case of *Hayward vs. the Pilgrim Society*, 21st Pick. 270, it was held that the trustees of a society incorporated for the purpose of building a monument, in virtue of their authority to manage the finances and property of the society, were held competent to bind the society by a promissory note through the agency of their treasurer.

These authorities fully establish the proposition, that in the construction of charters of corporations, the power to contract, and the mode of contracting, is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplish-

ment of the purposes of the charter. Now, what are necessary and proper means? Mr. Story, as we have seen, says, if the means are usual and appropriate, the implication of power arises. — Story on Bills, 95.

Chief Justice Marshall, in the case of *McCullock vs. the State of Maryland*, 4th Wheaton 413, says: "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause of the constitution. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be necessary and proper for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves Congress, in each case, that only which is most direct and simple. Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of the human mind, that no word conveys to it, in all situations, one single, definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words, which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies. The word 'necessary' is of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phases." In conclusion upon this subject, he says, page 421, same case: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate,



which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Now, if this be true doctrine in relation to the constitution of the United States, surely it will not be contended that a more stringent rule will be applied in the construction of the powers of a corporation, than is applied in the construction of the powers of Congress under the constitution of the United States.

To apply these principles as established by the authorities cited, to the case under consideration. The Hiwassee Rail Road Company is chartered to construct a rail road, a thing of itself necessarily involving a heavy expenditure of money; but in addition thereto, it is empowered to sue and be sued, to acquire and hold, sell, lease and convey estates real, personal and mixed, which necessarily involves the power of making contracts for the same. How shall these contracts be made, both for the construction of the road and the purchase of the property? It is argued, that the capital stock of the company is the only means provided for the payment, and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given by which it may contract upon time; for if it may create a debt, of necessary consequence, it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. It is true, that the capital stock of the company is the source from whence an ultimate payment of the debts of the company must be made, but to hold that a sufficient amount of this stock must always be on hand, to pay immediately for every contract made, would be destructive of the operations of the company. By the provisions of the charter, not more than one fourth of the stock shall be called for in any one year, and this upon thirty days notice; and if, within thirty days after such notice, the amount called for be not paid, the company is authorized to take steps against the delinquent stockholders, to enforce payment. Now, it is obvious that it never was intended that all the stock should be paid in before the company commenced operations. The early completion of the road was a desirable object for commercial purposes, and can it be pretended, that the expenditures of the company were to be limited and restricted to the amount of capital actually paid in by the stockholders, and that under no circumstances were the company to exceed them? If, upon a failure of the means on hand, the stockholders should neglect to pay upon a proper call, are the works to be suspended until such time as payments could be enforced? Are the persons who may have done work for it, and for which they have not been paid, to wait the slow process of the law before they can receive satisfaction? And shall the company not be permitted to use its credit in such emergency? It is so argued for the defendant. This construction of the charter would be ruinous in its consequences. The company might be compelled to suspend all operations at a time when great loss would result from deterioration to unfinished work, and be greatly injured also in its credit.

The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal; but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.

There is no principle which prevents a corporation contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment, by drawing, or endorsing, or accepting notes or bills. It is not pretended that this power extends to the drawing, endorsing or accepting bills or notes generally, and disconnected from the purposes for which the corporation was created.

The corporation, in the present case, was indebted to one of its contractors for work done upon the road, for the payment of which, the note in question was drawn. This, upon principle and authority, was a usual and appropriate means for accomplishing the object and purposes of the charter, viz: the construction of the road. Not only do all the elementary writers sustain this view of the subject, but as we have seen, there are three adjudicated cases in courts of high authority directly in its favor. The case of *Mum vs. Commission Company*, 16th John. 52; the case of *Mott vs. Hicks*. 1st Cowen, 513; and the case of *Hayward vs. the Pilgrim Society*, 21st Pickering 270.

There has not been produced a single case to the contrary. The cases cited relied upon are decided upon different grounds entirely. The case of *Broughton, and others vs. the Company and Proprietors of the Manchester and Salford Water Works*, 3d Barnwell & Alderson 1, reported in the English Common Law reports 215, decides nothing more than that a corporation, not established for trading purposes, cannot be acceptors of a bill of exchange, payable at a less period than six months from the date, because such a case falls within the provisions of the several acts passed for the protection of the Bank of England, by which it is enacted, that it shall not be lawful for any body corporate to borrow, owe or take up any money upon their bills or notes payable at demand, or at any less time than six months from the borrowing thereof. It is true that Baily, J., in his opinion, says: "There being no power expressly given to the corporation to make promissory notes or become parties to bills of exchange, I should doubt very much (even if the Bank acts were entirely out of the question) whether such corporation would have any power to bind itself for purposes foreign to those for which it was originally established; and Best, J., in his opinion, says: "I am also of opinion, that this action

is not maintainable, because, this case comes within that rule of law by which corporations are prevented from binding themselves by contract not under seal. When a company, like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes; it would be impossible for either of these companies to go on without accepting bills. In the case of *Stark vs. the Highgate Arch Way Company*, 5th Taunt. 792, the court of common pleas seemed to think, that, unless express authority was given by the act establishing the company to make promissory notes *eo nomine*, a corporation could not bind itself except by deed. Now, there is nothing in the act of Parliament establishing this company, which authorizes them to bind themselves except by deed." So, the authority of this case for the defendant, rests solely upon the *dubitatur* of Baily and the opinion of Best, that the company could only bind itself by deed. How much, under these circumstances, it is worth, need not be said.

The case of the People of the State of New York *vs. the Utica Insurance Company*, 15th Johnson 358, decides, "that, since the act to restrain unincorporated banking associations, (April 11th, 1804, re-enacted April 6th, 1813,) the right or privilege of carrying on banking operations by an association or company, is a franchise which can only be exercised under a legislative grant; that a corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purposes of carrying into effect the powers expressly granted; and that the act to incorporate the Utica Insurance company does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits. Such powers not being expressly granted by the Legislature, and not being within their intention, as collected from the act of incorporation, and that the company having assumed and exercised these powers, they were held to have usurped a franchise.

It is scarcely necessary to enter into an investigation, to show the ground upon which this decision rests. Banking privileges, by an association or company, in New York, rest upon express grant. There was no such grant to the Utica Insurance Company, and an exercise of the power was not necessary and proper to the performance of the purposes for which it is created, but wholly foreign thereto.

In the case of the New York Firemen Insurance company *vs. Ely*, 2d Cowan, 678, it is held, that a company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them, enumerating the kind of securities upon which they may loan money, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes or any securities other than those especially enumerated. This company being incorpo-

rated for the purpose of insurance only, the discounting of promissory notes would have been foreign to the purpose of its creation ; but, in addition thereto it is expressly prohibited from carrying on any other trade or business, or exercising banking powers, and the kind of securities upon which it may loan money are especially enumerated, promissory notes being excluded, it is a well settled maxim of the law, the *expressio unius exclusio est alterius* ; — then, for many reasons, this company had no power under its charter to discount notes. It is not only not given expressly or by implication, but upon every principle of legal construction, is withheld.

In the case of the Life and Fire Insurance Company *vs.* the Mechanics Fire Insurance Company, of New York, 7th Wendell 31, it is held, that “ a corporation authorized to lend money only on bond and mortgage, cannot recover money lent by the corporation, except a bond and mortgage be taken for its re-payment ; every other security, as well as the contract itself, is void, and not the basis of action. The reason for this decision is obvious ; bond and mortgage being specified as the securities, upon which the company might lend money, all others were considered as excluded, upon the principle mentioned above, *expressio unius exclusio est alterius*.”

These are all the cases relied upon by the defendant for the support of the position assumed by him ; we are satisfied that they have no applicability to the question, and are not authority in this case.

We are then of opinion, (to use the words of Chief Justice Marshall, in the case of *McCullock vs. the State of Maryland*,) that the end proposed by the Hiwassee Rail Road Company, in executing the note in question, was legitimate, and within the scope of its charter ; that as a means it was appropriate, and plainly adapted to that end, which is not prohibited, but consistent with the letter and spirit of the charter and therefore not void, but binding and effectual upon the company and the endorsers.

Let the judgment of the circuit court be reversed, and the case be remanded for a new trial.<sup>1</sup>

<sup>1</sup> The reporter has printed, as an appendix to this case (pp. 528-532), an opinion given by Ex-Chancellor Kent, of New York, as counsel. He came to the conclusion that the company had not power to borrow money ; and that the notes, being illegal and impliedly prohibited, could not be enforced against any of the parties thereto.

After stating the substance of the charter provisions, Chancellor Kent said (*inter alia*) :

Here we have the delineation of the powers of the company, and it cannot but strike any attentive reader of the act, that those powers are very specially designated and confined within strict and narrow limits. The road is to be made out of capital or funds raised by subscriptions, and to be called for from time to time, under reasonable and guarded checks, from the subscribers or stockholders. The power of acquiring and making the road, the extent of the expenditures to be bestowed in making it, the source from which the moneys requisite for the work are to be procured, and the manner in which they are to be raised, are all declared in the charter with a certainty and precision that cannot be mistaken ; and here we may confidently conclude that the charter contains no power in the president and directors to borrow money upon loan,

## SECTION V.

*Power to make By-Laws.*

HOBART, C. J. [?], IN NORRIS v. STAPS.

1614-1625 [?]. *Hobart's Reports*, p. 211 a.

Now I am of opinion, that though power to make laws is given by special clause in all incorporations, yet it is needless; for I hold it to be included, by law, in the very act of incorporating, as is also the power to sue, to purchase, and the like. For, as reason is given to the natural body for the governing of it, so the body corporate must have laws, as a politic reason to govern it; but those laws must ever be subject to the general law of the realm, as subordinate to it. And therefore, though there be no proviso for that purpose, the law supplies it.

or to give their promissory notes to the lender of money, for the purpose of making the road and carrying into effect the object of the charter. The mode of raising the funds, and the limitation to the amount of those funds, are specifically prescribed, and all the other modes are necessarily excluded.

That it is an established and deemed a salutary rule in the construction of corporate powers, where the charter is for special purposes, and the powers and the manner of executing them specially designated, that no other powers and no other mode of exercising the powers granted, can be deemed lawfully to exist, I would refer to the English and American cases.—ED.

## CHAPTER VI.

## MODE OF CONTRACTING AND OF APPOINTING AGENTS.

## HORNE v. IVY.

20 Car. 2. 1 Modern, 18.

TRESPASS for taking away a ship. The defendant justifies as servant under the patent whereby *The Canary Company* is incorporated, and whereby it is granted, "That none but such and such should trade thither, on pain of forfeiting their ships and goods, &c." and says, that the defendant did trade thither, &c. The defendant demurs.

POLLEXFEN *for the plaintiff* contended, that the defendant ought to have shewn the deed whereby he was authorized by the Company to seize the goods:<sup>1</sup> though he agreed, that for ordinary employments and services a corporation may appoint a servant without deed, as a cook, a butler, &c.<sup>2</sup> A corporation cannot license a stranger to fell trees without deed.<sup>3</sup> Nor can they make a disseisor without deed, nor deliver a letter of attorney without deed.<sup>4</sup> SECONDLY, The plea is double; for the defendant alledges two causes of a breach of their charter, *viz.* their taking in wines at *the Canaries*, and importing them here; which is double. Then there is a clause that gives the forfeiture of goods and imprisonment, which cannot be by patent.<sup>5</sup> This patent I take also to be contrary to some acts of parliament, *viz.* 2. *Edw.* 3. c. 1. 2. *Edw.* 3. c. 2. 2. *Rich.* 2. c. 1. 11. *Rich.* 2. c. 2; and these statutes the king cannot dispense withal by a *non obstante*.

TWISDEN, *Justice*. For the first point, I think, they cannot seize without deed, no more than they can enter for a condition broken without deed.

KELYNGE, *Chief Justice*. We desire to be satisfied, Whether this is a *monopoly* or not? — It was ordered to be argued again.<sup>6</sup>

<sup>1</sup> 26. Hen. 6. pl. 8. 14 Edw. 4. pl. 8. Bro. "Corporation" 59.

<sup>2</sup> Plowd. 95.

<sup>3</sup> 12. Hen. 4. pl. 17.

<sup>4</sup> 9. Edw. 4. pl. 59. Bro. "Corporation," 24. 34. 14. Hen. 7. pl. 1. 7. Hen. 7. pl. 9. 1. Roll. Abr.

<sup>5</sup> 8. Co. 125. Noy, 123.

<sup>6</sup> It appears in *Kemble and Ventris*, that judgment was given in this case for the plaintiff, on the first objection, because the defendant justified by the command of a corporation, without shewing that his authority to seize the ship was by a deed; and S. C. *Siderfin* says, that the Court also held the bar bad in substance, because the king by his patent cannot create a forfeiture for the doing those things which his patent prohibits. See 3. Peer. Wms. 424. Hardres, 55. Skinner, 135, 224. 8. Co. 125. Palmer, 5. 3. Lev. 353. 1. Salk. 32. 5. Com. Dig. "Trade," (B.). 1. Burr. 526. 1. Term Rep. 118.

MARSHALL, C. J., IN BANK OF U. S. *v.* DANDRIDGE.1827. 12 *Wheaton*, 64.

[In this case the majority of the Court *held*, that the acceptance of a cashier's bond by the board of directors of a bank may be proved without the production of a written record; and that, although there was no recorded vote of acceptance, the acceptance might be proved by evidence of the facts that the person acted as cashier and was recognized as such by the directors, and that the bond was required to be given as a condition precedent to his so acting, and was actually found among the corporate documents.

MARSHALL C. J., delivered a dissenting opinion, from which the following extracts have been made.]

MARSHALL C. J.

The plaintiff is a corporation aggregate; a being created by law, itself impersonal, though composed of many individuals; these individuals change at will; and, even while members of the corporation, can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation and after they cease to be so, for every thing they do, whether in the name of the corporation, or otherwise. The corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature.

Can such a being speak, or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will. The voice which utters it must be the aggregate voice. Human organs belong only to individuals. The words they utter are the words of individuals. These individuals must speak collectively to speak corporately, and must use a collective voice. They have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing.

A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing.

If, then, corporations were novelties, and we were required now to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that where other

means were not provided by statute, such will must be expressed in writing.

But they are not novelties. They are institutions of very ancient date; and the books abound with cases in which their character and their means of action have been thoroughly investigated. In Brooke's Abridgment (title Corporation), we find many cases, cited chiefly from the Year Books, from which the general principle is to be extracted, that a corporation aggregate can neither give nor receive, nor do anything of importance, without deed. Lord Coke, in his commentary on Littleton (66 b.), says: "But no corporation aggregate of many persons capable can do homage." "And the reason is, because homage must be done in person, and a corporation aggregate of many cannot appear in person; for, albeit, the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate, itself, cannot be seen, nor do any act, but by attorney." So, too, a corporation is incapable of attorning otherwise than by deed (6 Co. 386), or of surrendering a lease for years (10 Co. 676), or of presenting a clerk to a living (Br. Corp. 83), or of appointing a person to seize forfeited goods (1 Vent. 47), or agreeing to a disseisin to their use (Br. Corp. 34). These incapacities are founded on the impersonal character of a corporation aggregate, and the principle must be equally applicable to every act of a personal nature.

Sir William Blackstone, in his Commentaries (v. 1, p. 475), enumerates, among the incidents to a corporation, the right "to have a common seal." "For," he adds, "a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore acts and speaks only by a common seal. For though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

Though this general principle, that the assent of a corporation can appear only by its seal, has been in part overruled, yet it has been overruled so far only as respects the seal. The corporate character remains what Blackstone states it to be. The reasons he assigns for requiring their seal as the evidence of their acts, are drawn from the nature of corporations, and must always exist. If the seal may be exchanged for something else, that something must yet be of the same character, must be equally capable of "uniting the several assents of the individuals who compose the community, and of making one joint assent of the whole." The declaration that a seal is indispensable, is equally a declaration of the necessity of writing; for the sole purpose of a seal is to give full faith and credit to the writing to which it is appended. The seal in itself, not affixed to an instrument of writing, is nothing; is meant as nothing, and can operate nothing. The writing is the substance, and the seal appropriates it to the corporation.

. . . . .



The English cases on this subject are very well summed up by Mr. Kyd, p. 259. The result of the whole appears to be, that in England the general rule is that a corporation acts and speaks by its common seal, at least so far as respects the appointment of officers, whose duties and powers are important. In those transactions where the use of the seal would be unnecessary and extremely inconvenient, it is frequently dispensed with; but in all of them, I think, writing is indispensable. In almost every case which I can imagine, there ought to be and is a record in the corporation books. With respect to the necessity of a seal, the difference is certainly great between ancient and modern times; and between corporations whose principal transactions respected land, and those which are commercial in their character. This distinction may and ought to influence the use of the seal, but not the use of writing. The inability of a corporation aggregate to speak or act otherwise than by writing, is constitutional, and must be immutable, unless it be endowed by the legislature with other qualities than belong to the corporate character. The English cases, so far as I have had an opportunity of examining them, concur in the principle that a corporation aggregate can act only by writing.

When a being is created without the organs of speech, and endowed only with the faculty of communicating its will by writing, we need not look in the laws given by its creator for a prohibition to speak or a mandate to write. These are organic laws which it is compelled to observe. If we find, in the act of its creation, an enumeration of duties and powers which are to be performed and exercised by writing, it is evidence that the creator considered it as certain that the creature would write, and that the evidence of its conformity to the will of the creator would be found in writing. It is equivalent to a declaration that it shall act by writing.

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## BANK OF COLUMBIA v. PATTERSON'S ADMINISTRATOR.

1813. 7 *Cranch*, 299.<sup>1</sup>

ERROR to the Circuit Court for the District of Columbia.

*Indebitatus assumpsit* by Patterson's Adm'r against the Bank of Columbia. In 1804, a written agreement was made between Patterson and a committee of the directors, whereby the committee agreed to pay Patterson for carpenter work which he was to do upon a new bank building agreeably to a certain plan and in a particular manner. In 1807, a sealed agreement was entered into between Patterson and a

<sup>1</sup> Statement abridged. Part of opinion omitted. — Ed.

committee of the directors, under their private seals. It recites, that a difference of opinion had arisen between Patterson and the committee for building the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee, in 1804, and thereto annexed; whereupon it was agreed, that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called in Georgetown old prices, and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed, that the outhouses, respecting which there had been no specific agreement, should be measured and valued by the same persons in the same manner.

Evidence was offered as to the work done, including a paper of particulars of the work, certified by the persons named in the agreement of 1807. It was proved that, while the work was going on, the defendants paid Patterson sundry large sums of money on account thereof.

Defendants requested an instruction that the plaintiff was not entitled to recover, which was refused.

Defendants also asked an instruction — that the plaintiff could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount thereof to the plaintiff; and that the jury could not, from the evidence offered, presume any such promise. This request was also refused.

*Morsell and Key*, for plaintiffs.

*Jones and C. Lee*, for defendants.

STORY, J. [The court overruled various objections. Among other points they held: 1st, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not in such case necessary to declare upon the special agreement: 2d, that a promise which would be implied by law for the extra work, against the corporation, was not extinguished, by operation of law, by the provisions of the sealed contract of 1807; the said sealed instrument merely recognizing an existing debt, and providing a mode to ascertain its amount and liquidation.

After deciding the above and other points, the opinion proceeds as follows:]

The case has thus been considered all along, as though the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee, in their own names. In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has therefore occurred, how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in

the case, how far the facts proved show an express or an implied contract on the part of the corporation.

Anciently, it seems to have been held, that corporations could not do anything without deed. 13 H. 8, 12; 4 H. 6, 7; 7 H. 7, 9.

Afterwards, the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters without deed: as to retain a servant, cook, or butler. Plow. 91, b.; 2 Sand. 307; and gradually this relaxation widened to embrace other objects. Bro. Corp. 51; 1 Salk. 191; 3 Lev. 107; Moore, 512. At length, it seems to have been established, that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. *Rex v. Bigg*, 3 P. Wms. 419; and courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal, 1 Fonb. 296, Phil. ed. note (o.) The sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.

As it is conceded, in the present case, that the committee were fully authorized to make agreements, there could then be no doubt, that a contract made by them in the name of the corporation, and not in their own names, would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

The technical doctrine, that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court, that adjudged cases fully support the position. *Bank of England v. Moffat*, 3 Bro. Ch. Rep. 262; *Rex v. Bank of England*, Doug. 524, and note ib.; *Gray v. Portland Bank*, 3 Mass. Rep. 364; *Worcester Turnpike Corporation v. Willard*, 5 Mass. Rep. 80; *Gilmore v. Pope*, 5 Mass. Rep. 491; *Andover & Medford Turnpike Corporation v. Gould*, 6 Mass. Rep. 40.

In the case before the court, these principles assume a peculiar

importance. The act incorporating the Bank of Columbia, (act of Maryland, 1793, ch. 30,) contains no express provision authorizing the corporation to make contracts. And it follows that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy, and retain, lands, tenements, hereditaments, goods, chattels, and effects, of what kind, nature, or quality, soever, and the same to sell, grant, demise, alien, or dispose of — and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of the money or credit of the bank, in the common course of banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question, how far the bank notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical, that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have laid against the committee personally, upon their express contract, yet as the whole benefit resulted to the corporation, it seems to the court, that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case, it appears to the court that there was no error in the court below, and that the judgment ought to be affirmed.

## SHERMAN v. FITCH.

1867. 98 *Massachusetts*, 59.<sup>1</sup>

BILL IN EQUITY by assignees of the Northampton Street Sugar Refinery, an insolvent corporation, praying for a decree that a recorded mortgage of personal property, held forth by the respondent as having been made to him by the corporation, might be declared void. The mortgage (dated Jan. 19, 1865) purported, by the language of the grant, covenants, and condition, to be the mortgage of the corporation. It was signed "George R. Sampson, President of Northampton Street Sugar Refinery. [Seal.]"

After a demurrer had been overruled, the respondent filed an answer putting in issue the validity of the mortgage as a mortgage of the corporation. The case was reserved for determination by the full court on agreed facts, which were, in part, as follows:—

For some time prior to January 19, 1865, the respondent had been, and then was, selling agent of the corporation, which owed him about eighteen thousand dollars, to secure the payment of which by the corporation, George R. Sampson, who was president and a director, and was also manager of the manufacturing department, executed and delivered to him the instrument in question. At that date there were four directors (who were the principal stockholders): Sampson; his son; a nephew; and one Tappan, who was in Europe. That was the full number of the board required by the by-laws, which also provided that "the board of directors shall manage and control the business, property and affairs of the corporation." The records of the corporation contained no express vote of either directors or stockholders authorizing the execution and delivery to the respondent of a mortgage on the corporate property; but the execution and delivery of the instrument was known to all the directors except Tappan, at the time thereof, "and was approved by them, provided their neglect to make any objection to the same can be construed as an approval."

*C. H. Drew*, for complainants [argument omitted.]

*D. P. Kimball*, for respondent.

WELLS, J. [The court *held*, that the mortgage was, upon its face, the mortgage of the corporation, and not the individual contract of Sampson. The court then said:]

The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation

<sup>1</sup> Only so much of the case is given as relates to a single point. — ED.

may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals. *Emmons v. Providence Hat Manufacturing Co.* 12 Mass. 237. *Milledge v. Boston Iron Co.* 5 Cush. 158. *Lester v. Webb*, 1 Allen, 34. The absence of one of the directors in Europe could not deprive the corporation of the capacity to act and bind itself by the acts of the officers in actual charge of its affairs.

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### ROBERTS v. P. A. DEMING WOODWORKING CO.

1892. 111 *North Carolina*, 432.

THIS was a civil action, tried at the August Term, 1892, of *Buncombe* Superior Court, before *Bynum*, J., for the value of work and labor done for the defendant corporation.

The defendant denied the debt, and resisted payment upon the further ground that the contract was not in writing under seal of the corporation, nor signed by any authorized officer thereof, and therefore void under section 683 of *The Code*.<sup>1</sup> When the plaintiff rested his case, the Court intimated he could not recover on his own showing; the contract, being above \$100, was not according to the formalities prescribed by *The Code*, s. 683. Whereupon the plaintiff submitted to a nonsuit and appealed.

*H. B. Carter*, for plaintiff.

*T. H. Cobb*, for defendant.

CLARK J. The court ruled that the plaintiff could not recover in any aspect of the evidence, because the contract of the defendant company was not "in writing and under the seal of the corporation, or signed by some officer of the company duly authorized," as required by *The Code*, s. 683. That section and its purport was construed in *Curtis v. Piedmont Company*, 109 *Nor. Car.* 401. It is there held that it applies to executory contracts and protects corporations from enforcement of such unless evidenced in the manner prescribed by the statute. But the Court adds that it does not apply to cases where the corporation has received and availed itself of property sold and actually delivered to it. In such cases, the company can be compelled to pay the fair value of such property. In the present case the claim is for work and labor done at a specified rate. The contract not being in writing and signed (or sealed), as required by the statute, the plaintiff cannot force the defendant to continue the contract as to the unexecuted part,

<sup>1</sup> "Every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto." — *Code*, s. 683. — ED.

but the plaintiff is entitled to recover a fair value for the labor already performed, and which the company has accepted, and of which it has enjoyed the benefit.

The defendant contends, however, that this action is brought upon the express contract, and that no recovery can be had upon a *quantum meruit*, and that if this is not so, still there was no evidence to justify a verdict for the value of the services. The complaint is sufficient to warrant a recovery, either upon express contract or for the value of the work and labor done. *Stokes v. Taylor*, 104 Nor. Car. 394, and cases there cited; *Fulps v. Mock*, 108 Nor. Car. 601. No amendment was necessary, but if desirable, the Court, in accordance with the present system of procedure, which, without undue neglect of form, favors a trial upon the merits, could and should have allowed an amendment of the complaint after a verdict in favor of the plaintiff, if successful. *The Code*, s. 273. As to the second objection raised, the contract price agreed upon between the authorized agent of the company and the plaintiff, while not conclusive (since the express contract was perforce abandoned), was certainly some evidence sufficient to go to the jury as to the value of the services.

The nonsuit must be set aside, and the case remanded for further proceedings in accordance with this opinion.<sup>1</sup>

PER CURIAM.

*Error.*

FOSTER, J., IN ROYAL BANK OF LIVERPOOL v. GRAND  
JUNCTION R. & D. CO.

1868. 100 *Massachusetts*, page 445.

[In an action of contract on corporate bonds.]

FOSTER, J. A sealed instrument conclusively imports a consideration. And these bonds, having been duly executed and delivered, the holders could have maintained an action upon them, if their delivery had been merely gratuitous, and no value had ever been given for them.

<sup>1</sup> For a more elaborate opinion reaching substantially the same result upon a somewhat similar statute, see *Pixley v. W. P. R. R.* 33 Calif. 183; and compare *Foulke v. R. Co.* 51 Calif. 365.

LORD CAMPBELL, C. J., IN MAYOR, &c. OF NORWICH *v.*  
NORFOLK R. CO.1855. 4 *Ellis & Blackburn*, p. 443 to p. 445.

[In an action against a railway company on a covenant under their seal that, unless certain works were completed within twelve months, whether an Act of Parliament then agreed to be obtained should be obtained or not, the company would pay 1000*l.* as liquidated damages.]

LORD CAMPBELL C. J. Although the agreement be under seal, we may examine to see whether there was any, and what, consideration for the contract to pay money, when we are to determine whether the contract was or was not *ultra vires*. The mere circumstance of a covenant by directors in the name of the Company being *ultra vires*, as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under the seal of the Company for the purchase of a large quantity of iron rails and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purpose of the railroad, it would be no defence to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the Company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee; and, he being in *pari delicto*, I conceive that the maxim would apply *potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the Company; and the illegality might be set up as a defence. So, if, without any consideration whatever, the directors of a railway company were to put the Company's seal to a deed covenanting to pay a mere stranger 1000*l.*, this would be *ultra vires*, to the knowledge of the covenantee, and he could not maintain an action to recover the 1000*l.* from the funds of the Company in fraud of the shareholders. When the excess of authority, with the knowledge of both parties, is shewn by plea, this joint violation of the law, I apprehend, is a bar to the action.

It has been contended, I am aware, that the deeds of such companies are to be treated like the deeds of individuals or of common partnerships. But there seems to be an essential distinction between them. The individual may do what he likes with his own; and he may bind himself by a deed disposing of his property, however capriciously, and without any consideration, so that no fraud has been practised upon him. In such a case, want of consideration is immaterial; no one is injured; and there is no illegality to be pleaded. "To look upon



a railway company," says Lord *Langdale*, in *Colman v. Eastern Counties Railway Company*, 10 *Beav.* 1, 14, "in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public, but with the private rights of all individuals in this realm. We are to look to these powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public;" "and I am clearly of opinion, that the powers which are given by an Act of Parliament like that now in question, extend no farther than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned." The same learned Judge, in answer to an argument that the directors may apply the funds of the Company as they please, so that their object is to increase the traffic upon the railway, and thereby to increase the profits of the shareholders, exclaims, "surely that has no where been stated; there is no authority for saying any thing of that kind."<sup>1</sup> "Unless acts so done can be proved to be in conformity with the powers given by the statutes under which those Acts are done, they furnish no authority whatever."

The equity reports abound with cases in which injunctions have been granted against the application of the funds of such companies to purposes not authorized by the Acts of Parliament creating them, although professedly for the benefit of the shareholders: and I apprehend that a contract, against the performance of which an injunction would be granted in equity, must be considered illegal and void at law, on proof that, to the knowledge of both parties, it is beyond the power of the directors, and leads to a misapplication of the funds of the Company.

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AMERICAN NAT. BANK v. AMERICAN WOOD PAPER CO.

1895. 19 *Rhode Island*, 140.<sup>2</sup>

DEBT ON bond. Certified from the Common Pleas Division on demurrer to the declaration.

Plaintiff sues as purchaser and bearer of certain coupon bonds, issued by the defendant corporation under its corporate seal, payable to the

<sup>1</sup> This citation is from the judgment as reported in 16 *L. J. N. S. Chancery*, 78. The passage in the judgment as reported in 10 *Beav.* p. 15, is to the same effect, but not in the same language.

<sup>2</sup> Statements abridged. Part of opinion omitted. — Ed.

Girard Life Insurance, Annuity and Trust Company, or bearer, or in case of registry to the registered owner.

*Richard B. Comstock & Rathbone Gardner*, for plaintiff.

*Arnold Green & James Tillinghast*, for defendant.

STINESS, J. The plaintiff sues to recover the principal and interest due on certain bonds and coupons issued by the defendant May 1, A. D. 1890, and payable May 1, 1900, or sooner after five years. The bonds are secured by a mortgage of all the defendant's property, in the State of Pennsylvania, given to a trustee for the bondholders, in which it is provided that in case of default in the payment of interest for more than six months, the principal of said bonds shall be due and payable. The declaration sets out the bonds and mortgage, profert of which is made, and alleges default in payment of interest for more than six months after demand made therefor. The defendant demurs to the declaration, upon several grounds; but the two grounds pressed in the argument are that the bonds are not negotiable so as to give the plaintiff a right of action in its own name, and that the terms of the mortgage cannot be imported into the bonds so as to give a right of action for the principal thereof before maturity.

We think that the bonds must be treated as negotiable securities. While there has been some diversity of opinion upon this subject, the tendency of recent decisions and the weight of authority and reason seem now to be in favor of negotiability. At first, before such bonds had become common, courts naturally held that they lacked the technical and established characteristics of negotiable instruments. Thus, in *Crouch v. The Credit Foncier*, L. R. 8 Q. B. 374 (1873), it was held that the contract embodied in similar bonds prevented them from being promissory notes, even if they had been without a seal, and that the custom to treat them as negotiable, being of recent origin, could not attach as incident to a contract contrary to the general law. But in *Goodwin v. Roberts*, L. R. 10 Exch. 337 (1875), the court, by Cockburn, C. J., does not concur in thinking the latter ground conclusive. In the recent case *Venables v. Baring*, L. R. 3 Ch. Div. 527 (1892), American railroad bonds, upon the evidence of an American lawyer as to their negotiability in this country, were held to have acquired in England, in the city of London, among English merchants, the character of negotiability. Notwithstanding the limitations of this decision we think it may be taken as practically settling the rule in England. See also *In re Imperial Land Co.*, L. R. 11 Eq. Cas. 478. In this country the decisions have been quite explicit. The principle on which they rest was well stated by Mr. Justice Grier, in *Mercer County v. Hackett*, 1 Wall. 83 (1863), as follows:

"This species of bonds is a modern invention, intended to pass by manual delivery and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the

necessity of commerce require that they should be so. A mere technical dogma of the courts of common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world and have received the sanctions of judicial recognition, not only in this court. (*White v. Vermont R. R.*, 21 How. 575), but of nearly every State in the Union, is well known and admitted."

After this strong statement it is needless to say more, except to refer to a few cases to the same effect. *Kneeland v. Lawrence*, 140 U. S. 209; *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268; *DeHass v. Roberts*, 59 Fed. Rep. 853; *Reid v. Bank of Mobile*, 70 Ala. 199; *National Exchange Bank v. Hartford, Prov. & Fishkill R. R. Co.*, 8 R. I. 375; 1 Randolph on Commercial Paper, § 74, note 1, and cases cited. It is true that some States have statutes which declare bonds of this kind to be negotiable, (see 2 Amer. & Eng. Ency. of Law, 319), and the point is taken that it is not so in this State, since Pub. Stat. R. I. cap. 142, §§ 6, 7, relate only to promissory notes. We do not think, however, that this fact prevents us from holding these bonds to be negotiable. Such statutes are declaratory and remedial and are evidently not intended to exclude other forms of negotiable paper. Bonds of this sort are clearly within the intent of the statute to give a title by delivery and a right of action to the holder of negotiable paper, and the bonds in effect are promissory notes. The special provisions contained therein are not such as to deprive them of their fundamental character of a promise to pay at a certain time. These bonds are not given as collateral to a note secured by mortgage, but the mortgage is security for the bonds themselves. *Riker v. Sprague Manuf. Co.*, 14 R. I. 402. See *Costello v. Crowell*, 127 Mass. 293, and 134 Mass. 280.

[Omitting opinion on remaining point.]

Our conclusion is that the demurrer to the negotiability of the bonds must be overruled, and the demurrer to the statements of the plaintiff's present right of action must be sustained.

## CHAPTER VII.

POWER OF MAJORITY.<sup>1</sup>

## DUDLEY v. KENTUCKY HIGH SCHOOL.

1873. 9 *Bush (Ky.)*, 576.*Cradock & Trabue*, for appellant.*Ira Julian*, for appellee.<sup>2</sup>

LINDSAY, J. The order from which this appeal is prosecuted must be regarded as final. The special demurrer to the jurisdiction of the court was sustained, and a judgment rendered against appellant for the costs of the entire proceeding. This is equivalent to dismissing the petition for the want of jurisdiction in the court, and effectually precludes appellant from taking further steps in this litigation to obtain the relief desired.

We are inclined to differ with the circuit court as to its want of jurisdiction to enjoin the collection of so much of appellant's subscription to the high-school as had not been reduced to a judgment in the Franklin Quarterly Court; but this question need not be considered in view of the fact that we feel satisfied, after a careful examination of the petition, that it sets out no cause of action, and that under the facts as presented, and the provisions of the act of the General Assembly incorporating the high-school, it cannot be so amended as to present a cause of action.

The object of the corporation was to establish and maintain a high-school, and not to make money, and it has no legal right to engage in speculations or investments in real estate for the last named purpose; but it has the expressly delegated power "to receive and hold for the benefit of said high-school any lands, tenements, etc., . . . by gift, devise, donation, contract, or purchase." It is not complained that the house and lands purchased or about to be purchased from Gaines are not to be held for the benefit of the school, but that the corporation is unable to pay the contemplated price, and that the inevitable result of the purchase, if consummated, will be the bankruptcy of the corporation and the failure of the project to establish the school.

<sup>1</sup> This subject is also discussed in various cases which are given under special topics treated of in subsequent chapters; especially in the cases relating to the stockholder's right to maintain suit, the cases relating to the reserved power of the legislature to alter or amend charters, and the cases on *ultra vires*. — ED.

<sup>2</sup> Citations of counsel omitted. — ED.

It may be conceded that the facts stated in the petition fully authorize this conclusion, and yet it does not follow that a court of equity has the power at the suit of a stockholder to interfere by injunction to prevent the corporation from executing a contract it has the lawful right to make.

It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted, a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. *Bagshaw v. Eastern Counties Railway Co.* (7 Hare, 114; 1 Beavan, 1); *Marsh v. Eastern Railway Co.* (40 N. H. 548). But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders.

Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. *Angell and Ames on Corporations*, sec. 393. Nor does the irregular manner in which the board of directors voted upon the proposition to make the purchase from Gaines authorize the chancellor to interpose to prevent its consummation. In the case of *Foss v. Harbottle* (2 Hare, 461), where the object of the bill in equity was to obtain relief against what was alleged to be a fraud committed by certain of the directors in an incorporated company, which fraud consisted in the sale to themselves, as representatives of the company, of lands in which they were individually interested, Vice-Chancellor Wigram held that although the act might be voidable by the company, yet, inasmuch as a majority of the proprietors might at a general meeting confirm it, he declined to interfere, saying, "While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." So in this case, while it may be that the corporation has the right to avoid the purchase from Gaines, because one of the directors, without whose vote the proposition would have been rejected, was allowed to vote by proxy, yet it may be that Dudley is the only stockholder who disapproves of the purchase, and it might result that, at the time the court was protecting him against the payment of his subscription because of the unauthorized action of the directors, a majority of the stockholders in general meeting might ratify or have already ratified the purchase, and bound

Dudley under his contract of subscription to submit to their will thus regularly and legally expressed.

It may be that the price agreed to be paid for the house and lands is greatly more than its value, but about this matter the opinion of the majority of the stockholders as expressed through the directory must control, and so far as the action of the court in this case is concerned it is immaterial whether the corporation acted wisely or unwisely in contracting a debt which possibly it will be unable to pay. The charter empowers it to make purchases of land, to contract debts, and to issue bonds to an amount not over two thirds of the stock subscribed; and if these powers are so exercised as to result in loss to the stockholders, it is a misfortune against which the courts can afford no protection.

*Judgment affirmed.*

### NATUSCH v. IRVING ET ALS.

1824. *Gow on Partnership, Appendix No. VI. Page 398.*<sup>1</sup>

PLAINTIFF, on behalf of himself and all others the shareholders, members, or partners of the Alliance British and Foreign Life and Fire Assurance Company, filed this bill against the president and directors, praying, *inter alia*, for an injunction to restrain them from carrying on the business of marine insurance in the name or on the account of the company, and from applying the capital of the company to any such purpose.

The case made by the bill and affidavits was, in part, as follows:

A prospectus was issued for the formation of an unincorporated company to grant fire and life insurance, with a capital of five million pounds divided into fifty thousand shares, plaintiff subscribed for fifteen shares, paid the required deposit, insured his life in the company and paid the insurance premium. He was willing also to execute a proper deed of settlement. After the plaintiff had subscribed, &c., the majority of the company undertook to carry on the additional business of marine insurance. They prepared a deed of settlement which contained provisions for enabling the company to carry on marine insurance; and which plaintiff refused to execute. Plaintiff objected to the company's carrying on a marine insurance business. The directors informed plaintiff that, if he was dissatisfied with the course intended to be pursued, he might receive back his deposit with interest, and also have his life policy cancelled and the premium returned.

LORD ELDON, CHANCELLOR.

<sup>1</sup> Statement abridged. Part of opinion omitted. The case was first reported in *Gow*, and has since been reported in 2 Cooper, *Tempore Cottenham*, 353. — Ed.

3. An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by *compelling* them to retire upon such terms, so to form a *new company*. This would, as to partnerships, be a most dangerous doctrine. Where a partnership is dissolved (even where it can be *in a sense* dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, *Take that, and we are a new company*, keeping the effects, means, assets, and property of the old, as the property of the new partnership.

4. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in.

5. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares.

If six persons joined in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent.

But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have

*acquiesced* in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction.

It may be taken that the principle that would apply to the partnership of six, will apply to this partnership of 600 or 700; 340 have executed in respect of not quite half the number of shares: there probably may be therefore 600 or 700 members. To those who have not had occasion to observe the boldness of speculation, it may seem astonishing that persons, and so many in number, should have engaged themselves in a speculation so little explained, and undertaken to execute deeds, of the contents of which they had so little information. To those who know the difficulty of applying the rules of law and equity to societies constituted of such numbers of persons not incorporated, it is not matter of surprise that persons, ignorant of those difficulties, should become members of such societies; it may be matter of surprise to them that persons who know the difficulty of applying those rules should become members, even where the nature of the speculation is clearly explained, and full information is given of the contents of the deeds to be executed. Much has been done with respect to the difficulty alluded to, by provisions how those who have demands upon such societies are to sue, and how such societies are to be sued; much remains to be done, and particularly as to rendering simple and effectual the remedies of the members of such societies against each other. It is observed that the members of this society *underwriting* will be each liable to the bankrupt laws. That depends upon the act of parliament which is to take effect in *May* next.<sup>1</sup> Shares may devolve to feme coverts, infants, &c.; but whatever are the difficulties, courts must struggle to remedy them, and to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six must, as far as the nature of things will admit, be applied to a partnership of 600.

*The injunction was granted.*

<sup>1</sup> 5 Geo. 4, c. 98, s. 2, by which an underwriter is declared to be a trader liable to the bankrupt laws, and see 6 Geo. 4, c. 16, s. 2. Formerly it was held that an underwriter, merely in that character, could not be a bankrupt. *Ex parte* Bell, 15 Vesey, 355.



## ASHTON v. BURBANK.

1873. 2 *Dillon*, 435.<sup>1</sup>

SUIT on a note given for an assessment upon stock in a corporation. Original charter authorized company to transact a "life and accident insurance" business. After defendant's subscription to the stock, the charter was amended, the name was changed, and the corporation was authorized to transact the business of "fire, marine, and inland insurance."

The amended charter was accepted, but in point of fact the corporation took no risks during the short period it afterwards did business except such as were authorized by its original charter. The defendant neither procured nor assented to the amendatory act, nor did he know of it until after its passage, and thereupon he protested against it and refused to pay the note on this ground. The note was sold to plaintiff by the insurance company after it ceased to do business, and long after the note was due.

DILLON, J.

3. The change in the charter, by which a life and accident company was authorized to transact fire, marine, and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them. Here there was no such assent, and no acquiescence in the structural change made in the charter of the company. The company could not, against such a subscriber, maintain a suit to collect his subscription, and take the money and use it as capital for the transaction of business under the charter as altered. We think, in such a case, the subscriber is not bound to enjoin action under the amended charter, but may, if he elects, defend against an action to recover on his subscription to the stock. If the company accepted the amended charter, as it did by adopting a new name, it is not essential to such a defence to show that at the time of the trial the corporation had actually exercised the enlarged powers conferred upon it. The defendants are not bound, on their subscription, to pay to the company money which, if paid, may be used as capital to carry on the business authorized by the amended charter.

*Judgment for the defendants.*

NELSON, J., concurs.

<sup>1</sup> Statement abridged. Only so much of the case and of the opinion given as relates to one point. — ED.

HARTFORD AND N. H. R. CO. *v.* CROSWELL.1843. 5 *Hill* (N. Y.), 383.

ASSUMPSIT, tried at the New-York circuit in March, 1841, before GRIDLEY, C. Judge. The action was brought to recover certain instalments upon the defendant's subscription to the capital stock of the plaintiffs' company. On the trial the case was this: In May, 1833, the legislature of Connecticut passed an act authorizing the plaintiffs to construct a rail-road from the town of Hartford to the city of New-Haven. The capital stock was divided into shares of \$100 each, and the defendant subscribed for and was allowed 10 shares. The subscription was in these words: "Whereas the general assembly of the state of Connecticut, at their session in May, 1833, passed a resolution incorporating the Hartford and New-Haven Rail-Road Company, with power to construct a rail-road or way from the town of Hartford to the city of New-Haven: We do hereby subscribe to the stock of said company the number of shares annexed to our names respectively, on the terms, conditions and limitations mentioned in said resolution. New-York, July 31, 1835." In May, 1839, the legislature of Connecticut amended the act of incorporation by authorizing the company to "procure, charter or purchase and hold" such number of steamboats, to be used in connection with their road, as they might deem expedient, to an amount not exceeding \$200,000; and, for that purpose, to increase their capital stock to the same amount. On the 2d of July following, the board of directors resolved to accept the amendment, and to adopt it as a part of the charter. They also resolved that the stockholders who were paying up their instalments should be allowed a preference in the distribution of the new stock to be created in pursuance of the amendment. In September, 1839, at a general meeting of the stockholders, the resolution to accept the amendment was ratified. Due notice of this meeting was given; but the defendant was not present, nor did it appear that he had at any time signified his assent to an acceptance of the amendment. Intermediate the date of the defendant's subscription and the amendment of the charter, the instalments sought to be recovered were regularly called for by public notice to that effect, and a personal demand thereof was shown to have been made of the defendant, who refused to pay. The road was completed and put in operation before the commencement of the suit. Upon these facts a verdict was rendered for the plaintiffs by consent, subject to the opinion of the court upon a case.

*S. P. Staples*, for the plaintiffs.

*C. Mc Vean*, for the defendant.

*By the Court*, NELSON, Ch. J. The main objection taken to a recovery in this case is, that the plaintiffs are seeking to enforce the performance of a different contract from that into which the defendant

entered when he subscribed for the stock; in other words, that the defendant never assented to the contract upon which the action is founded.

The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New-Haven. The ten shares subscribed for by the defendant were expressly taken upon "*the terms, conditions and limitations*" mentioned in the charter. And such would doubtless have been the legal effect of the subscription had no reference to the charter been made in it. The contract thus entered into was as specific and definite as the charter of the company could make it; and the meaning and intent of the parties cannot therefore be mistaken. It was a contract to take stock in an association incorporated for a particular object, having such limited and well defined powers as were necessary to the accomplishment of that object. The defendant assented to the object by his subscription, and thereby agreed that his interest should be subject to the direction and control of the powers thus expressly conferred, but nothing more.

Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking, a new and very different enterprise — and, for aught that can be known, a very hazardous one — with the necessary additional powers to carry it into effect. Instead of confining their operations to the construction and management of their rail-road between Hartford and New-Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats, at an expense not to exceed \$200,000; to all which, it is insisted, the contract of the defendant has become subject, without his approbation or assent.

It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. Indeed they can exercise no powers over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. This is so in the case of private associations, where the articles entered into and subscribed by the members are regarded as the fundamental law or constitution of the society, which can only be changed by the unanimous voice of the stockholders. (*Livingston v. Lynch*, 4 *John. Ch. Rep.* 573; *Coll. On Part.* 641.) So here, the original charter is the fundamental law of the association — the constitution which prescribes limits to the directors, officers and agents of the company not only, but to the action of the corporate body itself — and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished

or responsibilities incurred by the company, so, as to bind the individuals composing it, without their assent.

The question has been the subject of consideration in Massachusetts and Pennsylvania, and in each the courts have not hesitated to maintain the inviolability of the contract as originally entered into, denying to the company the power of altering it essentially and of binding the subscribers who have not given their assent. In the case of *The Middlesex Turnpike Corporation v. Locke*, (8 *Mass. Rep.* 268,) the suit was brought upon a subscription contract for stock, by which the defendant agreed to take one share and to pay all assessments made upon it. The ground of defence which prevailed was, that the location of the turnpike road had been changed by an act of the legislature; after the defendant's subscription, the act having been passed at the instance of the corporation; and that the defendant had never assented to the alteration. The court said: "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction. The defendant may truly say, *non hæc in fœdera veni*. He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." The same principle was recognized and admitted in the case of *The Indiana & Ebensburg Turnpike Co. v. Phillips*, (2 *Penn. Rep.* 184.)

I do not deny that alterations may be made in the charter by the procurement of the company, without changing the contract so essentially as to absolve the subscriber. Such would be the case, perhaps, in respect to mere formal amendments, or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may frequently be advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts.

Some of the cases which have occurred exemplify the difficulties attending the question. In *Irvin v. The Turnpike Co.*, (2 *Penn. Rep.* 466,) it was held that a benefit which results to individual property by the location of the road, did not, in contemplation of law, enter into the consideration of the contract of subscription. Hence, it was there decided that the subscriber was bound, notwithstanding a change in the location of the road made by an act of the legislature against his remonstrance; and this though the change was obviously to his prejudice in point of fact. The decision, it will be perceived, is contrary to the case before referred to in Massachusetts. The court, moreover, were not unanimous, Rogers and Kennedy, Js. having dissented. In *Gray v. The Monongahela Navigation Co.*, (2 *Watts & Serg.* 156,)

the same learned court held, that an alteration in the charter, by which additional privileges were granted to the corporation, was not such a violation of the contract of subscription as would relieve the subscriber, although the additional privileges might extend the liabilities of the company and thus incidentally affect him.

I refer to the last two cases as affording a very full and able examination of the subject, without intending, at this time, to assent to their conclusions or to all the reasonings of the learned chief justice who delivered the opinions. In each of them, however, the general principle before asserted in *The Indiana & Ebensb. Turnpike Co. v. Phillips* is recognized, viz. that the alteration by the legislature may be so extensive and radical as to work a dissolution of the contract; but an effort is made so to modify and regulate the application of the principle as to admit of improvements in the charter, useful to the public and beneficial to the company, without this consequence.

In the case before us, the change in the powers and purposes of the plaintiffs' company has been so extensive as to preclude us from sanctioning a recovery upon the defendant's subscription, unless we are prepared entirely to abandon the principle above stated and to declare that the interests of subscribers shall be subject to the will and pleasure of a majority of the stockholders. Judgment for the defendant.

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## STEVENS v. RUTLAND & BURLINGTON R. CO.

1851. 29 Vermont, 545.<sup>1</sup>

BILL IN CHANCERY, preferred before the Chancellor of the Third Judicial Circuit, against the Rutland & Burlington Railroad Company and three of its directors, by a stockholder; the object of which is to obtain an injunction, restraining defendants from using the corporate funds or credit for the purpose of constructing a railroad from Burlington to Swanton. The original charter authorizes the building of a railroad from Burlington in a southerly and southeasterly direction to a point on the Connecticut River. It provides that the capital shall be one million dollars; with the right in the corporation to increase it to an amount sufficient to complete said road and furnish all necessary apparatus for conveyance. The corporation was organized, the stock taken, and the road constructed and put in operation. The plaintiff subscribed, and paid for, five shares; and is still the owner of the same. After the plaintiff had become a stockholder, and after the road was in operation, the legislature passed an additional act, authorizing the corporation to extend its railroad from Burlington northerly to Swanton, a distance of about thirty miles; also providing that the

<sup>1</sup> Statement abridged. Portions of opinion omitted. — ED.

corporation, in the construction of this extension, shall have all the rights and privileges and be subject to all the liabilities contained in the original charter. This additional act was accepted by the board of directors. The directors caused a meeting of the stockholders to be called, to see if they would accept of this act as an amendment of their charter; and threatened, in case of acceptance, to apply the corporate funds in constructing the extension against the will of the minority and particularly of the plaintiff. After the bill was filed, and prior to the hearing, the meeting was held, and a majority of the stockholders voted to accept the additional act as an amendment of their charter. The defendants filed no affidavits, nor did they apply for a delay of the hearing for the purpose of answering the bill.

BENNETT, CHANCELLOR. The question is, can the orator, upon such a state of facts, claim, at the hands of the chancellor, his injunction.

It is an admitted principle, that in partnerships, and joint stock associations, they cannot by a vote of the majority change or alter their fundamental articles of copartnership or association, against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. It is equally well settled, that a court of chancery will, upon the application of an individual member of a partnership, or joint stock association, restrain, by injunction, the majority from using the funds or pledging the credit of the partnership or association in a business not warranted, and not within the scope of their fundamental articles of agreement. Courts of equity treat such proceedings by a majority, as a fraud upon the other members, which they will neither sanction or permit. To prevent the commission of fraud, by injunction, has been one of the earliest and most appropriate heads of equity jurisdiction, as well as to relieve against it, when committed. It was upon this principle that Lord ELDON, when High Chancellor, upon the application of a humble individual member of a company, which had been organized for the purpose of carrying on a fire and life insurance business, restrained the company, by injunction, from embarking also in the marine insurance business; though the applicant had paid into the funds of the company only one hundred and fifty pounds as a deposit upon fifteen shares, and the company gotten up by the Rothschilds of England, and composed of six or seven hundred individuals, with a capital of five millions sterling. See *Natusch v. Irving and others*; *Gow on Part. Appendix*, 576. The same principle was applied to a corporation by the Vice Chancellor, and by Lord Chancellor BROUGHAM, in the case of *Ware v. The Grand Junction Water Company*, 2 *Rus. and Mylne*, 470, *S. C.* 13 *Cond. Ch. Rep.* 126. The Vice Chancellor, upon the application of a single shareholder, restrained the corporation, not only from embarking their funds and credit in a matter beyond the provisions of their charter, but also from applying to parliament for a change in the charter, which would warrant it. The change desired to be made in that case was, that the company might be enabled to get their supply of

water by means of an aqueduct from the river Colne instead of the river Thames, as authorized to do under their original charter. Lord BROUGHAM, on appeal, dissolved that part of the injunction, it is true, which restrained the company from applying to parliament for an alteration of the charter in the particular desired, but retained the residue of it. So in *Cunliff v. The Manchester and Bolton Canal Company*, 13 Cond. Equity Rep. 131 n. the Vice Chancellor restrained the corporation, upon the application of a shareholder, from applying to parliament for a change in their charter, to enable them to convert a portion of their canal into a railway, and from applying any of the corporate funds to the proposed object.

It was well conceded, in the argument on the defense, that if the corporation had been about to proceed to a construction of the contemplated extension without the act of 1850, it would have been a proper case for an injunction. The only question which can be open to debate is, as to what shall be the effect of the act of 1850, and a subsequent adoption of the act by the corporation, upon the individual rights of a shareholder who does not assent to its adoption? If bound by it, there is no equity in this bill. It is, and must be admitted, that the legislature has no constitutional power, unless it be reserved in the grant, to change or alter an act of incorporation without consent, and thereby cast upon the company new and additional obligations, or take from them rights guaranteed under the original charter. And indeed this the legislature have not attempted to do. It is also equally true that it is a part of the law of corporations, that they act according to the voice of the majority. But it is to be remembered, that this is not a suit in which the plaintiff seeks to protect himself in any corporate right, but in his own individual right, growing out of the fact of his having become a corporator by his subscription and its payment, to the capital stock of the company. One of an aggregate corporation may contract with the company, as well as a third person; and the rights of the individual so contracting are no more distinct and independent in the one case than in the other. The plaintiff, by his subscription, assumed to pay to the corporation, and only for the purpose specified in the charter, its amount, according to the assessments; and there was at the same time a trust created, and an implied assumption on the part of the corporation, to apply it to that object, and none other. The corporation also assumed upon themselves to account to this corporator for his share of the dividends, when this road should be completed and put in operation, and for his share of capital stock, though not *in numero*. The charter, in this case, gives to the state the right to purchase out the road of the corporation, after a given number of years, upon certain terms therein specified. The relation between each original shareholder and the corporation is the same. The obligation of the contract between the legislature and the corporation, after an acceptance of the charter, is no more sacred than that which is created between the corporation and the individual corporator. Does any one

suppose the legislature could, without the consent of parties, absolve a corporator from liability on his subscription to the corporation, or modify it? and can they do the reverse of it?

It is conceded that there is a class of alterations in a charter, which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it. Where the object of the modification or alteration of the charter is auxiliary to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the original corporator cannot complain; and I should apprehend it would make no difference with the rights of a corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the company, and there is an implied assent, on his part, with the corporation, that they may apply for, and adopt such amendments as are within the scope, and designed to promote the execution of the original purpose; and he signs, and the corporation receive his subscription, subject to such implied contingency; and if we regard it in the nature of a license, only, it would not alter the principle. Both parties having acted upon it, it would not be countermandable.

But suppose the object of the alteration is a fundamental change in the original purpose, and designed to superadd to it something which is beyond and aside of it; does the same principle apply? [After citing and commenting on various cases, the last of which is *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 385, the learned Chancellor proceeds:] Chief Justice NELSON, in his opinion, lays down this general proposition, "that corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent."

This is a sound proposition. The consent or assent may, however, be implied in a class of cases, as has already been stated, where the amendment is not regarded as fundamental, and can be brought within the scope of the original purpose of the association; and this is going to the very verge of the powers of the corporation. It is difficult, and would be unwise, to attempt to lay down any general rules to determine in what precise cases the assent of the corporator should be implied, and in what not. It is sufficient for the present purpose to say, that his assent cannot be implied, in a case like the present, from a majority vote. Courts may differ, and doubtless will, in regard to what alterations shall be sufficient to constitute a fundamental change. But in the present case, I think, on this point there can be but one opinion. The termini of the road, as fixed by the charter, are Burlington, and



some point on the west bank of Connecticut River, in the county of Windsor or Windham. The capital stock is one million of dollars, with a right in the corporation to increase it to an amount sufficient to complete said road, and furnish the necessary apparatus for conveyance. The supplementary act of 1850 purports to authorize the corporation, within three years, to construct and extend their railroad from the terminus in Burlington, to some point in Swanton, in the county of Franklin, a distance of about thirty miles; and the act provides that in the construction of the road, they shall have all the rights and privileges, and be subject to all the liabilities, contained in their original charter, and the acts in addition to it.

The franchise granted to this company was territorial; and an extension of the termini necessarily is an extension of the franchise. It cannot remain the same thing in substance, until it can be established that a part is equal to the whole. Besides, the company may increase the capital stock to such additional sum as shall be necessary to construct the extension.

The statute of 1850 is little less in effect, if anything, than an attempt to create in a summary manner, and by the way of reference, a new corporation, and to transfer all the old corporators to it. If all the corporators had assented to this transfer, it was well enough. The change in the purpose was not more fundamental in the case from the 5th of Hill than in this. It is not necessary that the business should be changed in kind, to change the original purpose. If this is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the other to Massachusetts line; and there would be no limits to the control which the corporation might acquire over the individual corporators, and this, too, without their consent, except what arises from the confines of legislative authority.

The change, then, in the charter being fundamental and the corporation not being able to bind the plaintiff by a majority vote, what must be the result? If he had been sued for an assessment upon his stock, he might have claimed that he was absolved from all liability upon the acceptance of the amendment. And is not this reasonable? Shall it be said that the legislature and the corporation have power to embark this corporator in a speculation to which he has never consented? If it can be done in one case it can in another. But having paid his funds into the corporation, he has a right in chancery to compel a faithful performance of the trust by the corporation, in conformity to the original charter, and to keep them within its purview. No one can suppose that upon the payment of his subscription, the personal identity of the plaintiff was merged in the corporation, or that he ceased to have distinct and independent rights. In *Rex v. Eastern Counties Railway Company*, 1 Eng. Railway Cases 509, the King's Bench issued a mandamus, upon the application of a minority, against the company, directing them to proceed in the construction of a railroad which had been chartered between two points, the corporation having stopped short of one of the termini, and voted to go no further.

In the case before us, it must follow, if the plaintiff is not bound by the conjoined effect of the act of 1850, and a majority vote of the corporation, the defendants can stand on no better ground, than a voluntary association, who are about to go beyond and aside of their original articles, against the will of a minority. This, in effect, was conceded in the argument. There was nothing improper in the passage of the act of 1850, though upon the application of a portion of the directors of the company, as stated in the bill. No attempt is made by the legislature to impair the obligation of any contract between themselves and the corporation, or to cast upon the company any new and additional burthens without their consent. There was no attempt to impair any contract arising under the prior charter, between the corporation and the corporator as an individual, or disturb any vested right in either. The act is not mandatory; and there is, in fact, an implied condition annexed to it, that it is to be accepted by all whose individual and corporate interests are to be affected by it, before it shall become operative. But suppose this act had been mandatory upon the corporation and the several stockholders, to build this extension in the road within three years; would not all cry out against its palpable injustice? Suppose, instead of this, the legislature had left it optional with the corporation to accept or reject the act of 1850, and had provided, that in case of the acceptance of the amendment by the corporation, it should bind the corporators who dissented from it, or did not assent to it, and this too, in their individual rights; would there not be the same reason to cry out against it? Would it not, by its carrying a stockholder into an enterprise which he had never consented to, and changing the principles of liability between the corporation and the individual corporator from what they were under the original compact, impair and disturb vested rights under it? I have no hesitation in saying, that, in my opinion, it would be beyond the pale of the constitutional authority of the legislature.

In *Ellis v. Marshall*, 2 Mass. 269, it was held that no man could be made, by act of legislation, a member of an aggregate corporation without his personal consent; and the same principle would seem to apply when he is asked to remain and become a corporator under a supplementary act, to be attached to and become a part of the charter, where that which it is proposed to superadd is vital, and constitutes a fundamental change in the charter, which is but the constitution of the company.

[After discussing various authorities.] The case of *Ware v. The Grand Junction Water Company*, 2 Russell & Mylne, 461; s. c. 13 Cond. Chan. Rep. 126, has been relied upon to defeat the equity of this bill. The Vice Chancellor allowed a special injunction, in the terms of the prayer of the bill; the first branch of which restrained the company from making any application to parliament, or taking any other proceedings for obtaining such an alteration in the original charter, as was desired; and the second branch merely restrained them from carrying

those alterations into execution, independently of such legislative sanction; or from using, or permitting to be used, the seal, name, funds, credit, and officers of the company, with a view to effect any such purpose, under their existing constitution. The Lord Chancellor supported the injunction of the Vice Chancellor, so far as related to all such acts as were not authorized by the then present constitution of the company, but dissolved it, so far as to permit the company, as a *qua* corporate body, to apply to parliament for an alteration in their charter, so as to authorize the change desired; but restrained them from applying their corporate funds to that purpose. The Chancellor proceeded upon the ground, that it was an incidental right in the corporators, as a *qua* corporation, to apply for such a change; and that the plaintiff subscribed for stock, subject to such a contingency; and that all the arguments touching the proposed change, were proper for a committee of House of Lords, or Commons. He evidently goes upon the ground that parliament is the proper place to meet the question; and that if parliament decide to make the alteration proposed, it is binding upon all the corporators. I apprehend, that the views expressed by the Lord Chancellor in that case, if sound, must rest upon one of two grounds; either that the change asked for in the charter was not a fundamental one, or else upon the ground of the transcendent powers of a British parliament. It is said by Lord Coke, "that the power and jurisdiction of parliament is so transcendental and absolute, that it cannot be controlled or confined, either for causes or persons, within any bounds;" and in Steph. Elec. Law, vol. 1, p. 11, the doctrine is maintained, that the statutes of the realm are binding upon all the subjects, unless they are repugnant to the laws of God; and that they can only be dispensed with by the same authority of parliament with which they were made. And, though other writers have maintained the ground that there are certain boundaries set to the exercise of even the supreme powers of a British parliament, yet it is not necessary particularly to consider this subject. It is evident that Lord BROUGHAM in the case of *Ware v. The Grand Junction Water Company*, grounds himself upon the sovereign and uncontrollable powers of the parliament. The change in the charter, asked for in that case, would, under most if not all the decisions in this country, be regarded as a fundamental one. The argument of Lord BROUGHAM, at least in one particular, does not seem very sound. He says, "the company ought to have the power of obtaining an alteration in their constitution, or that the plaintiff ought to have come in as a member of it, under certain conditions and limitations." But would the conditions and limitations be more sacred than the constitution itself? and if parliament might change the constitution, might they not dispense with the conditions and limitations. See Amer. Law Mag. vol. 6, p. 93. But with us, no legislature can transcend the bounds of the constitution. It is not a constitutional tribunal, to hear and settle the rights of the parties, as Lord BROUGHAM seems to consider the British parliament. I apprehend, that in this state, no court

of chancery would restrain a corporation from applying to the legislature for a fundamental change in their charter; and a sufficient reason would be, that if the additional power and authority changed the character of the original contract, and defeated the vested rights of the stockholders, the act would bind such of the stockholders only as consented to the alteration.

[After discussing other authorities.] The Rutland and Burlington Railroad Company is but a private corporation, so far as the stockholders are concerned; though as it regards the powers of the legislature to authorize the taking of private property for public use, it may be said to be a *qua* public corporation. The stock is owned by individuals who compose the corporation, and from which they design to derive a profit; and they manage the business in view to their own interest; and it does not become a public corporation because the public interests may be incidentally promoted by it. In principle it is like a turnpike, a canal, or bridge charter; *Ten Eyck v. Delaware and Raritan Canal Company*, 3 Harr. (N. J.) 200. I think it is obvious beyond a reasonable doubt, upon principle and authority, that the plaintiff is not bound in his individual rights as a corporator, by force of the act of 1850 and the majority vote of the corporation, without his individual assent. In the case of public corporations, as in towns, counties, &c., a different rule may obtain. The distinction between private and public associations and corporations has been well settled since the days of Lord COKE. (Coke Little. 181, b.)

In case of public associations and corporations the public good requires that the voice of the majority should govern, and hence the power is more favorably expounded than when created for private purposes; and it would seem that public convenience required the adoption of such a rule. But in case of private associations and corporations it is not the doctrine that a majority can bind the minority in a matter beyond and aside of their original articles of association, or charter of incorporation, unless it be by special agreement giving such power, which must be a part of the original association.

If, in a case like the present, the majority cannot bind the minority, it is plain that there is an equity in this bill, and that the defendants can stand in no better situation than if they had, by a vote of the company, proceeded to build the extension, and to apply the funds and credit of the corporation to that purpose, without any additional act of the legislature. The case of *Livingstone v. Lynch et al.*, 4 Johns. Ch. 573. was the case of a voluntary association under the name of the North River Steamboat Company; and a majority, without the consent of the minority, changed by a vote the articles of association and proceeded in their business according to their new articles. The bill was brought by the plaintiff against the majority of the company to have the rights of the association reinstated on their former basis; and the chancellor decreed the new articles null and void, and set up the old articles, and enjoined all further proceedings under the new articles.

In the case of *Natusch v. Irving et al.*, which was also the case of a voluntary association, an injunction was allowed to restrain them from going into a business not within the scope of the original articles, in pursuance of a vote of the majority. And in that case, before the hearing, the defendant had offered to pay back all that the orator had paid into the company, with interest from the date of the payment, and also to fully indemnify him against all loss by the transactions of the company already had or thereafter to be had in the business which was beyond their original articles. Lord ELDON to this part of the case replies, in substance, that it is not competent for any number of persons in a partnership (unless so provided for) formed for specified purposes, to effect that formation by calling upon some of their partners to receive back their capital stock and interest, and quit the concern, which, in effect, would be merely compelling them to retire upon such terms as should be dictated to them, so as to form a new company; and that it is the right of a partner to hold his associates to the specified purposes whilst the partnership continues, and not to rest upon indemnities with respect to what he had not contracted to engage in; and that a partner cannot be compelled to part with his shares, though for double what he originally gave for them; and that it may be his principal reason for keeping them, to have the partnership carried on according to the original contract. This doctrine of Lord Chancellor ELDON necessarily grows out of the doctrine that it is the business of courts of justice to enforce the contracts of parties, not to make them. To give to courts not only the power to enforce, but also the power to make, or even modify in one iota a contract fairly made, would be the rankest despotism.

I am not ready to suppose the directors in procuring the act of 1850 to be passed, or the corporation in accepting that act, acted in bad faith to any of the old stockholders; but doubtless they were governed by the most honorable motives and meant it for the best good of all concerned, notwithstanding the allegations in the bill. The case is not put at all upon the allegations in the bill imputing bad faith to the directors in obtaining the act of 1850. If it was, it would be very material to the merits of the question that the bill should be answered. The ground assumed is, that this corporation had the funds of the original stockholders for an object distinctly defined in the original charter, and that they cannot be allowed to apply them to any other purpose whatever, without the consent of the stockholders, and that to do it would be a breach of trust.

In regard to the expediency of bringing this bill, the chancellor cannot, and has no right to judge. The orator has the constitutional and sole right of determining this matter; and if he thinks it expedient, we must acquiesce in it; and no plea of the public good or inequality of interests involved can justify the chancellor in denying to the orator a right which is clearly accorded to him by well established chancery principles. The public good is best promoted by an impartial adminis-

tration of justice according to the right of the case; and courts cannot measure the equality or inequality of interests in the litigant parties and make that a basis for a decision, notwithstanding what has been urged in the argument.

Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the corporation was carried out, constitute a breach of trust; and a court of equity cannot refuse to give relief by injunction. See *Agar v. The Regent's Canal Company*, Cooper's Eq. 77; *The River Dun Navigation Company v. North Midland Railway Company*, 1 Eng. Railway Cases 153-4. The case from the 1st vol. of *Railway Cases* was before the Lord Chancellor, and he uses this language: "If these companies go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, this court is bound to interfere; and that was Lord ELDON's ground in *Agar v. The Regent's Canal Company*." The Lord Chancellor further adds: "I am not at liberty (even if I were in the least disposed, which I am not,) to withhold the jurisdiction of this court, as exercised in the case of *Agar v. The Regent's Canal Company*." In that case Lord ELDON proceeded simply on the ground that it was necessary to exercise this jurisdiction of chancery for the purpose of keeping these companies within the powers which the acts give them. And it is added, "and a most wholesome exercise of the jurisdiction it is; because, great as the powers necessarily are, to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere if there was not a jurisdiction continually open and ready to exercise its power to keep them within their legitimate limits." It cannot justify the chancellor in refusing to exercise the jurisdiction of chancery because the defendants may claim the right to proceed under color of the act of 1850. It is a settled principle that the circumstance of the defendant's acting under color of law, simply, can form no justification. The question, after all, will be: does the law justify the act which is being done, or threatened to be done? *Osborn v. The Bank of the United States*, 9 Wheaton, 738. If a law is unconstitutional it can give no authority. If the power it confers is abused or exceeded, the person acting under the color of law is a wrong doer. In the case at bar the corporation had no power to build the extension under their original charter; and the act of 1850 is not binding upon the orator without his consent.

The injunction must therefore be allowed, but only so far as to restrain the defendants until the further order of the chancellor from applying the present funds of the corporation, or their income from the present road, either directly or indirectly to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the corporation in effect-

ing the object of the extension ; and at the same time the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object.

Though this is but an interlocutory decree, made upon the plaintiff's equitable rights as disclosed in the bill, still it having been twice argued, and it being a case of considerable interest and importance, I have deemed it proper to publish, somewhat at length, the grounds of my opinion. "To err is human ;" and if, upon more mature consideration, the conclusion of my own mind shall be found to be unsound, and not in accordance with principle and authority, I rejoice that they may be corrected by a superior tribunal.<sup>1</sup>

After the above decision was announced, and before the injunction was issued, the defendants proposed to file bonds to indemnify the plaintiff against all damages which he might sustain by reason of the extension ; upon which the chancellor suggested, that he did not deem it competent for him to make contracts for the parties ; and that upon the authority of the case of *Natusch v. Irving et al.*, it could make no difference, if filed, in the result.

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### TREADWELL v. SALISBURY MANUFACTURING CO.

1856. 7 *Gray*, 393.<sup>2</sup>

BILL IN EQUITY, by the executors and trustees under the will of Thomas Cordis, against the Salisbury Manufacturing Company and their directors. Plaintiffs held forty shares in the company, as part of the residue of testator's estate bequeathed to them in trust. The bill averred, among other things, that, at a meeting of stockholders, it was voted by a majority, but against the wishes of a minority and against the protest of one of the plaintiffs, that the directors have authority to sell all the real property of the corporation and all the personal property connected with the manufacture of goods ; provided that, in case of sale to a new company, the stockholders in this company should have a right to take an interest in the new one, in proportion to their respective interests in this. The bill also averred, that it was further voted, that, in case of sale, the directors should be authorized to close the affairs of the company and to take necessary measures for that purpose. The bill further averred, that the directors threatened and intended to sell said property to a new corporation called the Salisbury Mills, and to take in payment shares in the new company at par, and divide them proportionately among the stockholders of the old company, and surrender and give up their charter and franchise.

<sup>1</sup> The case was not carried to a higher court. — Ed.

<sup>2</sup> Statement abridged. Argument omitted. Only so much of opinion given as relates to one point. — Ed.

The answer alleged, among other things, that the defendants were negotiating with the Salisbury Mills for a sale of the property at a price of \$250,000, payable in stock of that corporation; also that the defendants and the Salisbury Mills were desirous to admit every stockholder in the old corporation to take and hold an interest in the new one, to any extent he pleased, but that that was and would be left optional with him. The answer also alleged that it was the intention of the defendants to make a sale of the property for the purpose of paying the debts of the corporation, and ultimately to wind up their affairs, and to distribute the stock obtained among the individual members, if they would accept it, otherwise to reduce it to cash and distribute its value among such members.

A hearing was had before BIGELOW, J., who reported the case to the full court. There was a conflict of testimony as to the adequacy of the price named. Defendants introduced testimony as to the affairs of the corporation, tending to show that it was advisable to sell the property and close the business.

*R. Fletcher & J. J. Clarke*, for plaintiffs.

*R. Choate*, for defendants.

BIGELOW, J. [The Court *held*, that the plaintiffs' case did not come within the limits of the "present<sup>1</sup> chancery jurisdiction" of the Court. The opinion then proceeds as follows:]

The views which we have taken dispose of the whole case. It is therefore unnecessary to go at large into a consideration of the other branch of the cause, which was fully and elaborately discussed at the bar. But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity. *Angell & Ames on Corp.* § 127 & seq. 2 Kent Com. (6th ed.) 280. *Mayor &c. of Colchester v. Lowton*, 1 Ves. & B. 226. 240, 244. *Binney's case*, 2 Bland, 142. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects *quasi* public, such as railway, canal and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community or some portion of it has an interest to see that their corporate duties are properly discharged. Such corporations may perhaps be restrained from alienating their property, and compelled to

<sup>1</sup> The Supreme Court of Massachusetts did not at this time have full equity jurisdiction. — Ed.



appropriate it to specific uses, by mandamus or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter, they do not undertake to carry on the business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued.

If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority. The case of *Ward v. Society of Attorneys*, 1 Collyer, 370, cited by the plaintiffs, does not support it. They were not a trading corporation; nor were their affairs in an embarrassed condition. It was the case of the majority of a corporation, attempting to surrender the old charter, and to pervert the corporate funds to a different purpose, by passing them over to a new association. Besides, the questions raised in the case were not finally determined by the vice chancellor. They were only considered so far as it was necessary to decide the question of granting an injunction preliminary to the hearing.

Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances it was in furtherance of the purposes of the corporation, to pay their debts, close their affairs and settle with their stockholders on terms most advantageous to them. *Sargent v. Webster*, 13 Met. 504.

Nor can we see anything in the proposed sale to a new corporation, and the receipt of their stock in payment, which makes the transaction illegal. It is not a sale by a trustee to himself, for his own benefit; but it is a sale to another corporation for the benefit and with the consent of the *cestuis que trust*, the old stockholders. The new stock is taken in lieu of money, to be distributed among those stockholders who are willing to receive it, or to be converted into money by those who do not desire to retain it. Being done fairly and not collusively, as a mode of payment for the property of the corporation, that transaction is not open to valid objection by a minority of the stockholders. *Hodges v. New England Screw Co.* 1 R. I. 347.

It was urged by the plaintiffs that the common law right of a corporation to sell their property and close their business, had been taken away by *St. 1852, c. 55*. But we do not think that such is its true interpretation. It is not restrictive in its terms, but only permissive. It was intended to provide a mode in which the charter of a corporation might be dissolved without a resort to the legislature. But it did not take away the right of a corporation to proceed in the sale of their property preparatory to a surrender of their charter, which is all that the defendants undertook to do.

*Bill dismissed.*

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TAYLOR v. EARLE, IMPEADED WITH BURLINGTON COTTON  
MILLS ET ALS.

1876. 15 *New York Supreme Court* (8 *Hun*), 1.

APPEAL from a judgment of the Special Term dismissing plaintiff's complaint.

The plaintiff was a stockholder in the Burlington Cotton Mills, a manufacturing corporation organized under the general laws of this State about August 14, 1866, whose principal office and place of business was in the city of New York. The corporation about the time of its organization purchased real estate, mills thereon, machinery and water privileges at Burlington, in the State of Vermont. About January 9, 1875, at a meeting of the stockholders, it was resolved by the holders of a majority of the stock to sell the property of the corporation to the Burlington Cotton Mills Company, a corporation created by the laws of Vermont, and take in payment thereof 1,747 shares of the stock of the latter company, and the property of the former was thereafter conveyed to the latter corporation for and in consideration of such stock, and for no other consideration. At the time of the resolution and conveyance, the defendant Jonathan Earle was president, and the defendant George B. Earle treasurer of both corporations, and held a majority of the stock of the Burlington Cotton Mills. The plaintiff never consented nor assented to the resolution to sell, nor to the acts done under such resolution.

For a long time prior to January, 1875, no report had been made to the stockholders of the Burlington Cotton Mills, nor of its financial affairs. A demand was made upon the treasurer, George B. Earle, that he furnish such report. After such demand, and before January 9, 1875, the defendants Earle and others of the Vermont corporation were a majority of the directors of the New York company. This action was brought by the plaintiff as a stockholder of the Burlington Cotton Mills (the New York corporation), holding 100 out of 1,000 shares of its stock, to set aside the conveyance aforesaid as illegal and

void, and for other relief; the Burlington Cotton Mills having refused to bring the action.

*E. Sprout*, for the appellant.

*Isaac L. Miller*, for the respondents.

BARNARD, P. J. :

I think the court erred in dismissing the plaintiff's complaint. He was a stockholder in the Burlington Cotton Mills, a New York corporation.

By a vote of a large majority of the stockholders (not including plaintiff), this corporation sold all its property, real and personal, except cash in hand, mills and franchises, to the Burlington Cotton Mill Company, a Vermont corporation, and took in payment 1,747 shares of this Vermont corporation.

The Burlington Cotton Mills, on plaintiff's request, refuse to bring this action, and it is well settled that in such a case a stockholder may assert his own rights, making the corporation a defendant.

I think it quite clear that plaintiff had a right to relief.

Either the transfer was void as *ultra vires*, or the property received in some way was liable to the debts of the Burlington Cotton Mills, and after their payment to distribution among those of the stockholders who did not wish to take a proportion of stock in the Vermont company.

The plaintiff cannot be forced to take the stock of the Burlington Cotton Mill Company without his own consent. The facts are all averred in his complaint, and he is entitled to any relief warranted by the facts, and not alone to that for which he has asked.

I am of opinion, however, that the whole scheme of the transfer and its execution was illegal.

There is no power given by the acts under which the Burlington Cotton Mills were incorporated to transfer all the property of a corporation, and then terminate its existence, and take in payment stock in a company carrying on the same business, with a different name, charter and stockholders, and being a foreign corporation.

The corporation, by the New York law, could increase or diminish its stock, or extend its business to other objects, but that falls far short, I think, of the sweeping power exercised on this occasion. The sale was not real. It was a mere form to turn a New York corporation into a Vermont one, and thus escape the scrutiny into the affairs of the company permitted by the New York law to the stockholders.

No majority can bind the non-consenting minority to this. He became a stockholder under the security of the New York law, and, when that is taken from him, at least he should have the property of his corporation applied to the payment of its debts, and the surplus, if any, divided among the stockholders.

I think the judgment should be reversed, and a new trial granted, costs to abide event.

GILBERT, J., concurred; DYKMAN, J., not sitting.

Judgment reversed, and new trial granted, costs to abide event.

## CHAPTER VIII.

STOCKHOLDER'S RIGHT TO BRING SUIT IN REFERENCE TO CORPORATE MANAGEMENT, OR TO PROTECT CORPORATE INTERESTS.<sup>1</sup> STOCKHOLDER'S RIGHT TO INSPECT CORPORATE RECORDS.

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## COMMONWEALTH, EX REL. SELLERS v. PHŒNIX IRON CO.

1884. 105 Pa. State, 111.<sup>2</sup>

ERROR to the Court of Common Pleas No. 2, of Philadelphia County.

Petition by George H. Sellers for a writ of alternative mandamus against the Phœnix Iron Co. and its officers, commanding them at reasonable times to give the petitioner and his clerks access to certain books and papers of the said company. The facts sufficiently appear in the opinion. The Court of Common Pleas granted a rule upon respondents to show cause why a writ of alternative mandamus should not issue. Subsequently, after hearing, the Court discharged the rule. Petitioner brought error.

*Samuel W. Pennypacker* and *John G. Johnson*, for plaintiff in error.

*R. C. McMurtrie* and *Wayne Mac Veagh*, for defendants in error.

TRUNKEY, J. The right of shareholders in large partnerships and companies, to inspect accounts, is usually qualified by express agreement; but it requires no express agreement to confer the right, for that is a consequence of partnership. If a company's deed of settlement provides for the inspection of its accounts by its shareholders at certain times and subject to certain restrictions, it seems they are not entitled to inspect the accounts otherwise: *Lindley on Part.*, 809. This writer also says that the right of inspection of the accounts of such companies is necessarily limited, for if every shareholder were at liberty to examine the accounts whenever he desired to do so, it would be impracticable even to keep them or make them up in a proper manner; and he apprehends that when there is no agreement to the contrary, the

<sup>1</sup> See Chapter, *post*, as to Voting Rights of Stockholders. — ED.

<sup>2</sup> Statement abridged. Arguments omitted — ED.

shareholders are entitled to have them produced at their meetings and to appoint persons to inspect and examine them. Perhaps nobody would question the correctness of these views. But they do not reach the case of a minority, powerless by vote to call for production of the books, or to make appointment of persons to inspect. In the absence of agreement every shareholder has the right to inspect the accounts, a right subject to the necessities of the company's business, yet existing. It has never been asserted that a partner in a large company, under pretence of inconvenience, can at all times be lawfully denied inspection of its accounts, unless the denial rests upon his own agreement. For proper purposes and at reasonable times the law gives him the right, even if its exercise be inconvenient to the book-keepers and managers of the partnership business.

Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders: *Angell & Ames' Corp.*, § 681; *Redfield on Railways*, 227; *Grant on Corp.*, 311; 2 *Phillips on Evi.*, 313; *Martin v. Bienville Oil Works*, 28 *Lou. Ann. Rep.*, 204. Cases may have been rare in which it was held that a shareholder was entitled to an extraordinary remedial writ for the enforcement of his right to inspect the books, but that does not evidence non-existence of the right. Text books and dicta of courts seem to have treated the right of shareholders in joint stock corporations, to inspect the accounts and papers, as similar to that of members in large partnerships where managers are appointed to transact the business. The necessary limitations practically prevent exercise of the right for speculative purposes, or gratification of curiosity; if every shareholder could inspect for such purposes, at his own will, the business of most corporations would be greatly impeded. In *Rex v. Merchant Tailors' Co.*, 2 *Barn. & Ad.*, 115, *TAUNTON, J.*, said: "There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute, between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary." This concisely puts the circumstances in which the shareholder may have specific remedy, if refused permission to inspect corporation documents and books: but if the right itself were not clear, he could not have that remedy at all.

It was conceded at the argument that a mandamus may be issued to a private corporation to compel the exercise of a franchise, or to restore an evicted person to his office or membership, or to compel performance of a duty imposed on a corporate official, expressly or by implication. The old rule was that the writ was only to be issued

in cases of public interest or having some relation to public officers or rights: Tapping on Mand., 12, 97. But the tendency in modern times is to grant a mandamus in certain cases where formerly it would have been refused; and the prerogative writ will go to compel "the production to a shareholder, for a proper purpose and at a proper time of such books as he has a right to inspect:" Lindley on Part., 1037. And this was said of the writ and cases without the common law procedure Act of 1854, plainly showing that the distinguished author was of opinion that the right of a shareholder to inspect the books of the corporation of which he is a member, exists at common law, and in a proper case may be enforced by mandamus. "Corporators have always, on showing a good reason, though not for curiosity's sake, a right of access to, and inspection of, all the books, muniments and papers belonging to the corporation, and if this general right be denied or obstructed, a mandamus to inspect may be had on proof of the refusal of the right to, and reason for the inspection:" Grant on Corp., 311; see Angell & Ames on Corp., § 707; High on Extra. L. Rem., § 308. In *Rex v. Merchant Tailors' Co.*, *supra*, decided half a century ago, it was held that the court will not grant an application by members of a corporate body, for a mandamus to inspect the documents of the corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection then will only be granted to such extent as may be necessary for the particular occasion; and the writ was refused because the applicants merely alleged grounds on which they believed the affairs of the corporation were improperly conducted, and the officers unduly chosen, and complained of mismanagement in some particular instances not affecting themselves, or any matter then in dispute. The doctrine declared in that case is the foundation of the rule in the text books, and the writ was refused solely on the insufficiency of the affidavits to make a case within the rule. Thirty years afterwards, CROMPTON, J., referring to *Rex v. Merchant Tailors' Co.*, as a leading case, said: "I take the result of the cases to be that a mandamus may go against a corporation at the instance of a member of the corporation to inspect and see whether he can raise a particular case in his favor by examining the books. It must in my view be a case with reference to some defined, distinct dispute, as to which it appears that it might be to his advantage to see the minutes of the corporation." After noting the contention of the company that a remedy existed by *quo warranto*, he adds: "The applicant who has no access to the documents of the corporation, would be able to make an affidavit of belief only as to the existence of the custom on which he founds his claim, while the corporation, who hold all the books, might set forth the entries making against the existence of the custom, and thus from want of access to the books the party might be prevented from getting his rule." A mandamus was awarded for the applicant and his attorney to inspect the minutes of the corporation

as to the elections of the assistants, that being the matter in dispute. *Burton v. The Saddlers' Co*, 31 Law Jour. R., 62. In the late case of *Martin v. Bienville Oil Works*, 28 Lou. Ann. R., 204, it was ruled that a stockholder of the corporation has a right to know how its affairs are conducted; that the board of directors, authorized by the charter to exercise all the powers of the corporation, could not rightfully deprive him of personal inspection of the books and papers that he might learn the condition and affairs of the company so that he could vote understandingly at a meeting of the stockholders; and upon showing that the directors had concealed from him the facts, he is entitled to relief by mandamus. One of the judges, on the ground that a stockholder's right to inspect is strictly personal, dissented from so much of the order as allowed inspection by agent — upon the main question there was no division. This case may go farther than is necessary for protection of the interests of individual shareholders, and is not cited for unqualified approval. Were it established that every stockholder may have a mandamus to enforce his right of inspection for the mere purpose of enabling him to vote understandingly, where the stockholders are numerous, there would likely result great inconvenience and hindrance in the conduct of the business of the corporation. The interests of all the corporators require that the writ shall not go at the caprice of the curious or suspicious. It would seem from the weight of authority, and in reason, that a shareholder is entitled to mandamus to compel the custos of corporate documents to allow him an inspection, and copies of them, at reasonable times, for a specific and proper purpose, upon showing a refusal on the part of the custos to allow it; and not otherwise. What would be a fit occasion is well indicated by the remarks of the court in *Burton and the Saddlers' Co.*; and they apply in case of other grievances of a shareholder as well as to the particular one of which he was speaking.

Among the cases cited at argument are two where it was said that mandamus is confined to cases of a public nature, and will not be awarded to a trading corporation. In the *King v. Bank of England*, 2 B. & Ald., 620, the application was by a stockholder for the writ to compel the governor and company of the bank to produce their accounts and declare a dividend. The *King v. London Assurance Co.*, 5 B. & Ald., 899, was a petition for a mandamus to compel a transfer of shares standing in the name of a bankrupt stockholder to his assignees. There was no ground for the writ in either case. The examination of accounts and division of profits may effectually be gone into in a court of equity. For a refusal to transfer shares of stock the injured party has an adequate remedy in an action for damages. But these decisions are based on the old rule which has been superseded, so far as the opinions go.

Statutory regulations in some states respecting the right of shareholders to inspect the books and muniments of corporations, and cases within such statutes, cast little if any light on the question now pend-

ing. It cannot be inferred from those enactments in other states that in this there is no such right of inspection at common law, or that in a fitting case a shareholder shall not have the appropriate remedy to secure its enjoyment specifically.

Has the relator shown such facts as entitle him to an alternative mandamus? The capital stock of the corporation is \$500,000, divided into shares of \$100 each, a majority of which is owned by David Reeves, president, and William H. Reeves, one of the directors. Its works are extensive and its business apparently prosperous, for the last ten years averaging over \$2,000,000 per annum; yet no dividend has been declared for the last nine years. In 1866 the relator purchased 238 shares of the stock for \$38,500, and still owns 234 shares. The principal part of the business of the corporation has been absorbed by a partnership in name of Clark, Reeves & Co.; the said Daniel Reeves and the said William H. Reeves and John Griffin, a director of said corporation, are partners and a majority of the partners in said firm of Clark, Reeves & Co.; and the relator avers that there is a contract of copartnership between the corporation and said firm, and that said president and two directors take advantage of their positions to advance their private interests as members of the firm to the disadvantage of the corporation. Every director holds a salaried position under the corporation. In 1875, the corporation transferred real estate of great value to secure alleged indebtedness to the estate of David Reeves, deceased, the trustees being interested in said estate.

Although a large stockholder for a long time, the relator has enjoyed neither income from his stock nor the privilege of knowing how the receipts from the business of the corporation are expended. His knowledge of the conduct of the business is that which is common to strangers, to the public. At a meeting of the stockholders he asked for information, and they refused to permit the minutes to be read, or papers to be examined. His request to the president of the company that a time and place would be named when and where it would be convenient for him to examine such books of the company as would give him information of the items of inventories, bills receivable, salaries of officers and minutes of meetings, was refused. His demand at the office of the corporation, during business hours, of the officers and directors, for access to the books and papers which would give him information upon subjects which he named, was refused. In those things that he named he is as directly interested as any other stockholder; but they are concealed from him by the directors and officers of the corporation who own a majority of the stock. The surface indications are that the business of the corporation has been profitable as well as large, and that the profits have been wrongfully appropriated by those who control the business, to the injury of the relator. Were an inner view permitted, he might see that there had been no profits, no misappropriation of moneys, and that all that has been done was well done for the interest of every shareholder.



The relator avers that he purposes filing a bill in equity against the corporation and its officers, and that it is necessary that he see the books and papers in order that he may correctly state the facts now concealed from him. Upon learning the facts he may abandon his purpose for want of matter of complaint. He desires "to inspect and see whether he can raise a particular case in his favor by examining the books;" upon the verity of the facts set forth in his petition, we are of opinion that he is entitled to an alternative mandamus. The writ should not extend to any books and papers other than such as contain information upon the subjects specified in the prayer of the petition.

*The order discharging the rule to show cause is reversed, and judgment for the Commonwealth that an alternative mandamus be issued. Record remitted for further proceedings.*

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SMITH v. HURD ET ALS.

1847. 12 Metcalf (Mass.), 371.<sup>1</sup> *rehearsal*

THIS was a special action on the case, by a stockholder of the Phoenix Bank against the directors. There were two counts; one founded in non-feasance of official duty, the other in misfeasance.

The first count alleged (*inter alia*) that it was the duty of the directors to direct and superintend the proceedings of the officers, and to exercise reasonable vigilance in seeing that the property of the bank was not lost, wasted, or misused; but that the directors disregarding their duty, and contriving together to injure and deceive the plaintiff therein, neglected to give reasonable personal attention to the business of the bank; and negligently permitted the whole business to be managed by the president, Wyman, who loaned its monies on insufficient securities, used certain sums himself, and made loans to individual directors exceeding the limits of the law; whereby the bank capital became wholly lost, and plaintiff was made liable, under the law, for his proportion of the capital lost by the official mismanagement of the directors, and further liable to pay large sums for the redemption of the bills of the bank.

The second count alleged (*inter alia*) that the directors, disregarding their duties, and contriving together to injure and deceive the plaintiff therein, concurred with each other that the whole business should be managed by the president, Wyman, as he should see fit; and that defendants themselves declared dividends when there were no profits, and caused false returns to be made to the State authorities, by which means plaintiff was misled and induced to rely on the security of his

<sup>1</sup> Statement abridged. Arguments omitted.—Ed.

investment. And, generally, the second count charged as acts of the defendants (done through Wyman) the matters which, in the first count, were charged as negligences and permissions, and deduced therefrom in like manner the failure of the bank, and the special damage to the plaintiff. The count concluded with an averment that defendants, by "misconducting the business of said bank, as aforesaid, so wilfully, deceitfully and fraudulently mismanaged the business and property of the said bank, that the whole capital thereof was utterly lost and wasted."

Defendants demurred to the declaration.

*B. R. Curtis* and *B. Rand*, for defendants.

*Gardiner* (*Greenleaf* with him), for plaintiff.

SHAW, C. J. This is certainly a case of first impression. We are not aware that any similar action has been sustained in England, or in any of the courts of this country. It is founded on no statute. It is an action on the case, at common law, brought by an individual holder of shares in an incorporated bank, against the directors, not including the president, setting forth various acts of negligence and malfeasance, through a series of years, in consequence of which, as the declaration alleges, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value. The circumstance that no such action has been maintained, would certainly be no decisive objection, if it could be shown to be maintainable on principle. But the fact, that similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained.

If an action can be brought by one stockholder, it may be brought by the holder of a single share; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty, in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance of such negligence, by which the shares are diminished in value fifty, ten, five, or one per cent. Still, notwithstanding these consequences, if the plaintiff has a good right of action, upon recognized and sound legal principles, his action ought to be sustained.

But the court are of opinion that the action cannot be maintained; and that on several grounds, a few of the more prominent of which may be alluded to.

1. There is no legal privity, relation, or immediate connexion, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders. The bank is a corporation and body politic, having

a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say the utter impracticability, of such a number of persons acting together in their individual capacities. The practical difficulty would be nearly as great, whether it were held that all must join in an action to recover damage for an injury to the common property, or that each might sue separately.

The stockholders do, indeed, ordinarily elect the directors; but it is as parts and members of the corporation, in their corporate capacity, in modes pointed out by the charter and by-laws, so that the directors are the appointees of the corporation, not of the individuals. Indeed, I believe there is a provision in the bank charters — there certainly was formerly — which is equally to the present purpose; namely, that the Commonwealth shall be at liberty to add a certain amount to the capital of various banks, and appoint a proportional number of directors. Such directors, so appointed, pursuant to the charter regulating the legal organization of the body, would stand in all respects on the footing of directors chosen by the stockholders. If these were liable to the action of individual stockholders, those would be, in like manner.

2. The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the organization of the institution gives them. (Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains when the charter of the bank is at an end, and its debts paid.)

3. But another important consideration is, that the injury done to the capital stock by wasting, impairing, and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first to redeem the bills and pay the debts

of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive any thing. It is, therefore, an indirect, contingent and subordinate interest, which each stockholder has, in damages so to be recovered against directors. If, upon such indirect, contingent, and remote interest, individual stockholders could recover for the defaults of directors, and especially, as is alleged in this case, where these defaults have been so great as to sink the capital, *a fortiori* would the creditors of the bank individually have a right to maintain similar actions; because their claim upon the funds, being prior to that of stockholders, would be somewhat more immediate and direct.

In the same connexion, it is obvious to remark, that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation.

4. But it is said, that although the real and personal estate, the securities and capital stock, are, in legal contemplation, vested in the corporation, yet the individual has a separate and distinct property and interest in his particular shares, by any injury to which he may have a separate damage. To some extent, it is true that he has a several interest in his shares; but it is to be taken with some qualifications. Strictly speaking, shares in a bank do not constitute a legal estate and property; it is rather a limited and qualified right which the stockholder has to participate, in a certain proportion, in the benefits of a common fund, vested in a corporation for the common use; it is a qualified and equitable interest, a valuable interest, manifested usually by a certificate, which is transferable. To the extent of this separate and peculiar interest, a stockholder, no doubt, might maintain his separate and special action, according to the nature of the wrong done to him in respect to it; as trover or trespass, for the conversion or tortious taking of his certificate; trespass on the case for refusing to make a transfer on a proper occasion; assumpsit for a dividend declared, and the like. But an injury done to the stock and capital, by negligence, or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action. Otherwise, he cannot. Co. Lit. 56 a. 3 Steph. N. P. 2372. *Lansing v. Smith*, 8 Cow. 146.

But we are pressed with the argument, that for every damage which one sustains, which is caused by the wrongful act of another, he ought to have a remedy. This is far from being universally true. Another maxim in regard to claims for damage is, *causa proxima, non remota, spectatur*. Thousands of instances occur, in which one sustains consequential and incidental damage from the misconduct of another, without a remedy at law. By the misconduct of the officers or agents of a parish, town, county, or even of the State or the Union, defalcations

may take place, treasure be squandered and wasted, and all the members of the respective aggregate bodies suffer damage, for which the law, from the nature of the case, can afford no direct remedy. But the true answer to the objection is, that stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy, through the powers thus vested in the corporation, for the common benefit.

On the whole, the court are of opinion that the demurrer is well taken, and that the action cannot be maintained.

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### DODGE v. WOOLSEY.

1855. 18 *Howard* (U. S.), 331.<sup>1</sup>

APPEAL from the U. S. Circuit Court for the District of Ohio.

This is a suit in equity by John M. Woolsey, to enjoin the collection of a tax, assessed by the State of Ohio, on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio. The defendants are Dodge, the tax collector, the directors of the bank, and the bank itself.

Woolsey avers that he is a citizen of Connecticut, that he is the owner of thirty shares in the Branch Bank of Cleveland, that Dodge and the other defendants are all citizens of Ohio, and that the Commercial Branch Bank is a corporation, made such by an act of the legislature of Ohio. He alleges that, by the act of incorporation, the Bank was to pay semiannually to the State a certain percentage on its profits, which was to be in lieu of all taxes to which the corporation, or the stockholders on account of their stock, would otherwise be subject. He further alleges that subsequent changes were made by the constitution and statutes of Ohio, undertaking to tax the Bank at a different and more burdensome rate. He asks the Court to enjoin Dodge from collecting by distress a tax which has been assessed against the Bank under this law; contending that the subsequent statute and assessment are in violation of the clause in the U. S. Constitution, which prohibits States from passing laws impairing the obligation of contracts. He finally declares that, as a stockholder of the Bank, he had requested the directors to take measures, by suit or otherwise, to assert the franchises of the Bank against the collection of what he believes to be an unconstitutional tax, and that they had refused to do so.

<sup>1</sup> Statement abridged. Only so much of the case is given as relates to one point.—ED.

Dodge filed an answer, in which he denied that Woolsey had made any application to the directors to prevent the collection of the tax. But it was agreed by the counsel that such an application had been made; and that the directors replied that, though concurring in the view that the tax was illegal, yet, in consideration of the many obstacles in the way of testing the law in the Courts of the State, they could not consent to take the action which they were asked to take.

*Spalding* and *Pugh*, for appellant.

*Stanberry* and *Vinton*, for appellee.

WAYNE, J. [After stating the case].

Upon the foregoing pleadings and admission, the circuit court rendered a final decree for the complainant, perpetually enjoining the treasurer against the collection of the tax, under the act of the 13th February, 1852, and subjecting the defendant, Dodge, to the payment of the costs of the suit. From that decision the defendant, Dodge, has appealed to this court.

His counsel have relied upon the following points to sustain the appeal:

1. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the bank provides that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax collector in their refusal to take legal steps to test the validity of the tax.

2. It was urged that this suit had been improperly brought in the circuit court of the United States for the district of Ohio, because it is a contrivance to create a jurisdiction, where none fairly exists, by substituting an individual stockholder in place of the Commercial Bank as complainant, and making the directors defendants; the stockholder being made complainant, because he is a citizen of the State of Connecticut, and the directors being made defendants to give countenance to his suit.

3. It was said, if the foregoing points were not available to defeat the action, that it might be contended that the defendant was in the discharge of his official duty when interrupted by the mandate of the circuit court, and that the tax had been properly assessed by the law of the State, in conformity with its constitution, of the 1st September, 1851.

We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the

progressive development of the powers and effects of private corporations upon all the business and interests of society.

It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. 2 Russ. & Mylne Ch. R., *Cunliffe v. Manchester and Bolton Canal Company*, 480, *n.*; *Ware v. Grand Junction Water Company*, 2 Russ. & Mylne, 470; *Bagshaw v. Eastern Counties Railway Company*, 7 Hare Ch. R. 114; *Angell & Ames*, 4th ed. 424, and the other cases there cited.

It was ruled in the case of *Cunliffe v. The Manchester and Bolton Canal Company*, 2 Russ. & Mylne Ch. R. 481, that where the legal remedy against a corporation is inadequate, a court of equity will interfere, and that there were cases in which a bill in equity will lie against a corporation by one of its members. "It is a breach of trust towards a shareholder in a joint stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and, therefore, he may file a bill in equity against the company in his own behalf to restrain the company by injunction from any such diversion or misapplication." In the case of *Ware v. Grand Junction Water Company*, 2 Russell & Mylne, a bill filed by a member of the company against it, Lord Brougham said: "It is said this is an attempt on the part of the company to do acts which they are not empowered to do by the acts of parliament," meaning the charter of the company; "so far I restrain them by injunction." "Indeed, an investment in the stock of a corporation must, by every one, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the act of incorporation, and which may possibly lead to extraordinary losses." The same jurisdiction was invoked and applied in the case of *Bagshaw v. The Eastern Counties Railway Company*; so, also, in *Coleman v. The same company*, 10 Beavan's Ch. Reports, 1. It appeared in that case that the directors of the company, for the purpose of increasing their traffic, proposed to guarantee

certain profits, and to secure the capital of an intended steam packet company, which was to act in connection with the railway. It was held, such a transaction was not within the scope of their powers, and they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the railway company was entitled to sue in behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the steam packet company. It was contended in this case that the corporation might pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway, and thereby increase the traffic to the shareholders. But the master of the rolls, Lord Langdale, said, "there was no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper application for a railway company to invest the profits of the company in the purchase of shares in another company. The dividend (says Lord Langdale, in *Solamons v. Laing*, 14 Jurist for December, 1850,) which belongs to the shareholders, and is divisible among them, may be applied severally as their own property; but the company itself or the directors, or any number of shareholders, at a meeting or otherwise, have no right to dispose of his shares of the general dividends, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of, that particular shareholder.

We do not mean to say that the jurisdiction in equity over corporations at the suit of a shareholder has not been contested. The cases cited in this argument show it to have been otherwise; but when the case of *Hodges v. The New England Screw Company et al.* was cited against it — (we may say the best argued and judicially considered case which we know upon the point, both upon the original hearing and rehearing of that cause) — the counsel could not have been aware of the fact that, upon the rehearing of it, the learned court, which had decided that courts of equity have no jurisdiction over corporations as such at the suit of a stockholder for violations of charter, reviewed and recalled that conclusion. The language of the court is: "We have thought it our duty to review in this general form this new and unsettled jurisdiction, and to say, in view of the novelty and importance of the subject, and the additional light which has been thrown upon it since the trial, we consider the jurisdiction of this court over corporations for breaches of charter, at the suit of shareholders, and how far it shall be extended, and subject to what limits, is still an open question in this court. 1 Rhode Island Reports, 312 — rehearing of the case, September term, 1853."



The result of the cases is well stated in *Angell & Ames*, paragraphs 391, 393. "In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members." "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation, the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors."<sup>1</sup>

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

It is obvious, from the rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought. That the pleadings must be relied upon to collect what they are, to ascertain in what character, and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement

<sup>1</sup> So it has been repeatedly decided, that a private corporation may be sued at law by one of its own members. The text upon this subject is so well expressed, with authorities to support it, that we will extract the paragraph 390 from *Angell & Ames* entire. A private corporation may be sued by one of its own members. This point came directly before the court, in the State of South Carolina, in an action of assumpsit against the Catawba Company. The plea in abatement was, that the plaintiff himself was a member of that company, and therefore could maintain no action against it in his individual capacity. The court, after hearing argument, overruled the plea as containing principles subversive of justice; and they moreover said, that the point had been settled by two former cases, wherein certain officers were allowed to maintain actions for their salaries due by the company. In this respect, the cases of incorporated companies are entirely dissimilar from those of ordinary copartnerships, or unincorporated joint-stock companies. In the former, the individual members of the company are entirely distinct from the artificial body endowed with corporate powers. A member of a corporation who is a creditor has the same right as any other creditor to secure the payment of his demands, by attachment or by levy upon the property of the corporation, although he may be personally liable by statute to satisfy other judgments against the corporation. An action was maintained against a corporation on a bond securing a certain sum to the plaintiff, a member of the corporation, the member being deemed by the court a stranger. *Pierce & Partridge*, 3 Met. Mass. 44; so of notes and bonds, accounts and rights to dividends. *Hill v. Manchester and Salford Water-Works*, 5 Adol. & Ellis, 866; *Dunston v. Imperial Glass Company*, 3 B. & Adol. 125; *Geer v. School District*, 6 Vermont, 187; *Methodist Episcopal Society*, 18 Ib. 405; *Rogers v. Danby Universalist Society*, 19 Ib. 187.

of a board of directors. Whether such acts are out of or beyond the limits of the act of incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do.

This brings us to the inquiry, as to what the directors have done in this case, and what they refused to do upon the application of their co-corporator, John M. Woolsey. After a full statement of his case, comprehending all of his rights and theirs also, alleging in his bill that his object was to test the validity of a tax upon the ground that it was unconstitutional, because it impaired the obligation of a contract made by the State of Ohio with the Commercial Bank of Cleveland, and the stockholders thereof; he represents in his own behalf, as a stockholder, that he had applied to the directors, requesting them to take measures, by suit or otherwise, to prevent the collection of the tax by the treasurer, and that they refused to do so, accompanying, however, their refusal with the declaration that they fully concurred with Woolsey in his views as to the illegality of the tax; that they believed it in no way binding upon the bank, but that, in consideration of the many obstacles in the way of resisting the collection of the tax in the courts of the State, they could not consent to take legal measures for testing it. Besides this refusal, the papers in the case disclose the fact that the directors had previously made two protests against the constitutionality of the tax, because it was repugnant to the constitution of the United States, and to that of Ohio also, both concluding with a resolution that they would not, as then advised, pay the tax, unless compelled by law to do so, and that they were determined to rely upon the constitutional and legal rights of the bank under its charter. Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it, is not "an error of judgment merely," and cannot be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the board of directors was not "an error of judgment merely," but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the corporation, in support of

which they cited the case of the Bank of the United States v. Osborn. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the circuit court of the United States for the district of Ohio, to resist a tax assessed under an act of that State, and executed by its auditor, and here the directors of the Commercial Bank of Cleveland, by refusing to do what they had declared it to be their duty to do, have forced one of its corporators, in self-defense, to sue. If the directors had done so in a State court of Ohio, and put their case upon the unconstitutionality of the tax act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the State court could have been re-examined, in that particular, in the supreme court of the United States, under the same authority or jurisdiction by which it reversed the judgment of the supreme court of Ohio, in the case of the Piqua Branch of the State Bank of Ohio v. Jacob Knoop, treasurer of Miami county, 16 How. 369.

*Decree of Circuit Court affirmed.*

CATRON, J., DANIEL, J., and CAMPBELL, J., dissented.

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PEABODY ET AL. v. FLINT ET ALS.

1863. 6 *Allen (Mass.)*, 52.<sup>1</sup>

BILL IN EQUITY, brought March 9, 1860, by two stockholders of the Lowell and Salem Railroad Company, for themselves and in behalf of the other stockholders, against certain directors and agents of said company, and of the Lowell and Lawrence Railroad Company, whose railroad connected with that of the former company, and others, charging various acts of conspiracy and fraud, by which the interests of the stockholders in the Salem and Lowell Railroad Company were prejudiced and sacrificed, for the benefit of the Lowell and Lawrence Railroad Company; and especially in reference to false and fraudulent representations and practices for the purpose of injuring the credit of the Salem and Lowell Railroad, and enabling them to issue and take its bonds, on the 20th of August 1856, secured by a mortgage of property of the company, at prices below their true value; and also in reference to a contract executed on the 1st of October 1858, by which the Lowell and Lawrence Railroad Company were to "do and perform all the transportation of persons and freight upon and over the Salem and Lowell Railroad," and to pretended settlements made between said companies. The bill also set forth that, since the plaintiffs had reason

<sup>1</sup> Arguments omitted. — Ed.

to suspect the frauds and conspiracies charged, they have demanded explanations of the defendants, petitioned the general court for an investigation, and endeavored to procure the election of directors who would cause the matters to be investigated, but, being in a minority, have failed to succeed. The defendants filed a general demurrer. The plaintiffs, at the argument, moved to amend their bill by joining the Salem and Lowell Railroad Company as defendants.

This case was argued in January 1862.

*J. G. Abbott* and *T. Wentworth*, for defendants.

*S. H. Phillips* and *J. A. Gillis* (*W. P. Webster* with them,) for plaintiffs.

CHAPMAN, J. The bill sets forth a very complicated case. A full consideration of the charges of fraud which it contains would involve the necessity of examining the various legislative acts which it recites, and the contracts and dealings which it sets forth. But such a discussion is unnecessary.

The principal ground of demurrer relied on by the defendants is, <sup>11/</sup> that the plaintiffs have not, and never had, any remedy for such injuries as they complain of; that, conceding the truth of the allegations that the directors of the Salem and Lowell Railroad Company, either by themselves or with the consent and connivance of a majority of their stockholders, combined, either among themselves, or with the Lowell and Lawrence Railroad Company or its directors, or with any of the other defendants, to defraud a minority of the stockholders of the Salem and Lowell Railroad Company, and in pursuance of this combination did the acts alleged, and so dealt and managed as to destroy the value of the stock as set forth, yet the only relief which the minority can have is the very imperfect one of selling out their stock for what it will bring in market. This doctrine is said to result from the nature of corporate property, which, being owned absolutely by the corporation, is under the absolute control of a majority of the stockholders, and of such directors as they choose to elect. Their decisions and acts, it is said, are final, and the minority are bound to submit to them.

But this doctrine, if correct, would place the property of stockholders in a corporation in a perilous condition. For it would enable the managers of one corporation to get the control of another by the purchase of a majority of its stock for the purpose, and then to manage its affairs in such subservience to the interests of their own corporation, as to render the stock of the minority worthless, and avail themselves of its value without compensation. The demurrer concedes, for the purposes of this discussion, that the managers of the Lowell and Lawrence Railroad Company have thus acted in respect to the minority of stockholders in the Salem and Lowell Railroad Company. It requires no great sagacity to see how similar frauds may be practised in behalf of many other railroads against connecting or rival roads, so that a system of railroad connections may become a system of frauds. If it may be practised with impunity between railroad corporations, it may

also be practised between manufacturing corporations, and a managing majority may, at their pleasure, sacrifice the interests of the minority for the benefit of another corporation owned by them. The same remark is true in respect to several other classes of business corporations. The question thus presented is of great importance, because there is no known practicable method of establishing and managing railroads except by means of corporations; and many other great enterprises and branches of business which require, for their successful prosecution, a large and permanent investment of capital, are also usually and most conveniently established and managed by means of corporate organizations.

This doctrine is also said to result from the nature of corporations and corporate property, as stated in *Smith v. Hurd*, 12 Met. 371. The views taken in that case are unquestionably correct; and they apply with especial force to that class of corporations whose stockholders have little more power than to elect officers, who, when elected, are invested by law with the sole and exclusive power of managing the concerns and business of the corporation. The corporation itself is regarded as a distinct person; and its property is legally vested in itself, and not in its stockholders. As individuals, they cannot, even by joining together unanimously, convey a title to it, or maintain an action at law for its possession, or for damages done to it. Nor can they make a contract that shall bind it, or enforce by action a contract that has been made with it. The artificial person called the corporation must manage its affairs in its own name, as exclusively as a natural person manages his property and business. The officers, though chosen by vote of the stockholders, are not their agents, but the agents of the corporation; and they are accountable to it alone. Therefore one or more of the stockholders cannot maintain an action at law against the officers for any breach of official duty that injures the corporate property as a whole. An injury done by the directors of a company to an individual by inducing him to become a member of the company by means of false representations is actionable, because it is an injury to him and not to the company. *Gerhard v. Bates*, 2 El. & Bl. 476. But the interest of stockholders is, as stated in *Smith v. Hurd*, cited above, merely a qualified and equitable interest.

But if there is an equitable interest, there must result from it equitable relations and equitable rights; and these rights may be enforced by equitable remedies. As between the corporation itself and its officers, it was long since held that they were trustees, and that a court of equity would hold them responsible for every breach of trust. *Charitable Corporation v. Sutton*, 2 Atk. 400. The corporation itself holds its property as trustee for the stockholders, who have a joint interest in all its property and effects, and each of whom is related to it as *cestui que trust*. The corporation may call its officers to account if they wilfully abuse their trust, or misapply the funds of the company; and if it refuses to sue, or is still under the control of those who must be

made defendants in the suit, the stockholders who are the real parties in interest may file a bill in their own names, making the corporation a party defendant; or a part of them may file a bill in behalf of themselves and all others standing in the same relation, if convenience requires it. *Robinson v. Smith*, 3 Paige, 222, and cases there cited. See also the other authorities cited for the plaintiffs on this point; and *Hersey v. Veazie*, 24 Maine, 9, and *Smith v. Poor*, 40 Maine, 415, cited by the defendants.

If other parties have participated with the officers in such proceedings, they may, according to the established principles of equity pleading, be joined as parties. In the discovery of frauds, and in furnishing remedies to parties defrauded, equity does not suffer technicalities to stand in its way, but seizes upon the substance of the case, and holds all parties to their just responsibility, following trust property into the hands of remote grantees and purchasers who have taken it with notice of a trust, in order to subject it to the trust. The objection, therefore, that a court of equity has no power to furnish a remedy in a case of this character, is untenable.

But there is another objection to the bill which must prevail. Equity regards diligence as one of its important elements; and it discountenances laches as inequitable; and unreasonable delay to prosecute an existing claim is a bar to a bill in equity, especially when the parties cannot be restored to their original position, and injustice may be done. *Veazie v. Williams*, 3 Story R. 610. *Tash v. Adams*, 10 Cush. 252. *Fuller v. Melrose*, 1 Allen, 166. Story on Eq. § 1520 and note 3.

In this case there has been unreasonable delay. The bill was sworn to March 9, 1860. The mortgage complained of was executed August 20, 1856, and the lease to the Boston and Lowell Railroad Company, October 1, 1858. The contracts and dealings to be investigated and readjusted commenced in 1850, and continued till the execution of the mortgage, and even to the execution of the lease in 1858. Every day's delay increased the complication and the difficulty of making an equitable adjustment of them. In the mean time, the stock in the corporations must have been frequently changing hands, and there are no means of adjusting the equities growing out of such changes. A similar remark is applicable to the holders of the bonds secured by the mortgage. The nature of the case required the utmost diligence, in order to prevent injustice. Yet the plaintiffs delayed more than three years and a half after the making of the mortgage, and until after they had sought aid from the legislature. It does not appear that they had not at that time sufficient knowledge of the facts to enable them to prosecute, or that they have since gained any important information; and a decree such as they now seek may injuriously affect many persons who have become stockholders or bondholders during the period of this delay. For this reason the demurrer is sustained, and the bill dismissed.

## FOSS v. HARBOTTLE.

1843. 2 *Hare*, 461.<sup>1</sup>

BILL in equity by Foss and Turton, shareholders in a corporation styled the Victoria Park Company, on behalf of themselves and all other shareholders, against five persons who had been directors, and also against several other persons.

The case stated in the bill was, in part, as follows :

At or after the formation of the company was agreed upon, an arrangement was fraudulently concerted between certain parties (including a majority of the directors), with the object of enabling themselves to derive a profit or personal benefit from the establishment of the company. The arrangement was, that certain of the parties should be appointed directors, and should purchase for the company certain lands owned by themselves and by other parties to the combination, at greatly increased and exorbitant prices. The directors, accordingly, before the passing of the act, agreed to purchase certain lands at rents or prices greatly exceeding those at which the vendors had purchased the same. After the passing of the act of incorporation, the directors and their confederates proceeded to carry into execution the previously formed design of fraudulently profiting by the establishment of the company and at its expense. The directors, accordingly, on behalf of the company, purchased from themselves, and from the other parties, lands charged with chief or fee-farm rents, greatly exceeding the rents payable to the persons from whom the said vendors had purchased the same. By these means, the company took the land, charged not only with the chief rents reserved to the original landowners, but also with additional rents reserved and payable to the immediate vendors (the directors *et als.*). In further pursuance of the same fraudulent design, the directors, after purchasing the said land for the company, applied about 27,000*l.* of the monies in their hands, belonging to the company, in the purchase or redemption of the rents so reserved to themselves and their associates, leaving the land subject only to the chief rent reserved to the original landowners. The lands purchased by defendants were re-sold by them to the company at a profit and at a price considerably exceeding the real value of the same. Owing to the sums appropriated by the directors to themselves, and paid to others in reduction of the increased chief rents, and payment of such rents, and owing to their having otherwise misapplied monies, the funds of the company in their hands were exhausted, and they raised large sums upon mortgage or incumbrance of lands and property of the company, which they had no authority to do under the act of incorporation. Some of the lands thus mortgaged, though the equitable property of the company, did not stand in the name of the company ; and hence

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

some of the mortgagees had no notice of want of authority on the part of the mortgagors.

The bill further alleged, that there had ceased to be a sufficient number of directors to constitute a board for transacting the business of the company; and that, in the present circumstances of the company and of the board of directors, the shareholders had no power to take the property of the company out of the hands of the former directors, or to appoint directors to supply the vacancies, or to wind up, or dissolve, the company, without the assistance of the court.

The bill also alleged, that the defendants concealed from the plaintiffs and the other shareholders the aforesaid fraudulent and improper acts and proceedings; and that plaintiffs and the other shareholders had only recently ascertained the particulars thereof, so far as they were now stated.

The bill prayed, that an account might be taken of the losses and expenses incurred in consequence of the said fraudulent and improper dealings of the defendants with the monies, lands, and property of the company, which they were liable to make good, and that they might be respectively decreed to make good the same, including in particular the profits made by buying and re-selling the said land; that it might be declared that the mortgages upon the lands, etc., created as aforesaid, so far as regards the defendants who executed the same or were privy thereto, were created fraudulently and in violation of the provisions of the act, and that certain of the defendants might be decreed to make good to the company the principal and interest due upon such of the mortgages as were still subsisting; that inquiries might be directed to ascertain which of the mortgages could be avoided and set aside as against the persons claiming the benefit thereof, and that proceedings might be taken for avoiding them accordingly; and that a receiver might be appointed.

Certain of the defendants demurred to the bill, assigning for cause, want of equity, want of parties, and multifariousness.

*Lowndes, Rolt, Walker, and Glasse*, in support of the demurrers.

*James Russell, Roupell, and Bartrum*, for the bill.

WIGRAM, VICE-CHANCELLOR. The relief which the bill in this case seeks, as against the Defendants who have demurred, is founded on several alleged grounds of complaint; of these it is only necessary that I should mention two, for the consideration of those two grounds involves the principle upon which I think all the demurrers must be determined. One ground is, that the directors of the Victoria Park Company, the Defendants *Harbottle, Adshead, Byrom, and Bealey*, have, in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or, rather, taken to themselves out of the monies of the company a price exceeding the value of such lands: the other ground is, that the Defendants have raised money in a manner not authorized by their powers under their act of incorporation; and, especially, that they have mortgaged or incumbered the lands and property of the company, and applied the



monies thereby raised in effect, though circuitously, to pay the price of the land which they had so bought of themselves.

[Part of opinion omitted.]

For the present purpose, I shall assume that a case is stated, entitling the company, as matters now stand, to complain of the transactions mentioned in the bill.

The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the *Attorney-General v. Wilson*<sup>1</sup> (without going further), it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the *Attorney-General v. Wilson* in this, — that instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of, — the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.

The demurrers are, — first, of three of the directors of the company, who are also alleged to have sold lands to the corporation under the circumstances charged; secondly, of *Bealey*, also a director, alleged to have made himself amenable to the jurisdiction of the Court to remedy the alleged injuries, though he was not a seller of land; thirdly, of *Denison*, a seller of land, in like manner alleged to be implicated in the frauds charged, though he was not a director; fourthly, of Mr. *Bunting*, the solicitor, and Mr. *Lane*, the architect of the company. These gentlemen are neither directors nor sellers of land, but all the frauds are alleged to have been committed with their privity, and they also are in this manner sought to be implicated in them. The most convenient course will be, to consider the demurrer of the three against whom the strongest case is stated; and the consideration of that case will apply to the whole.

<sup>1</sup> Cr. & Ph. 1.

The first objection taken in the argument for the Defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the Defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, inter se, because, in order to make their common objects more attainable, the crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord *Cottenham* in *Wallworth v. Holt*,<sup>1</sup> and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, — rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill, entitling the Plaintiffs to sue in their private characters. [His Honor stated the substance of the act, sections 1, 38, 39, 43, 46, 47, 48, 49, 67, 70, 114, and 129.<sup>2</sup>] The result of these clauses is, that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.

Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might *primâ facie* entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those

<sup>1</sup> 4 Myl. & Cr. 635. See also 17 Ves. 320, per Lord *Eldon*.

<sup>2</sup> *Supra*, p. 464, n., et seq.

transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of *Preston v. The Grand Collier Dock Company*.<sup>1</sup>

On the first point, it is only necessary to refer to the clauses of the act to shew, that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by cestui que trusts, complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is, that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is, that although the act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shewn either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The

<sup>1</sup> 11 Sim. 327, S. C.; 2 Railway Cases, 335.

question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights.

[The learned judge then controverted the plaintiff's position that, upon the allegations of the bill, it must be regarded as impossible to now legally convene a general meeting of the shareholders. He was of opinion that certain clauses in the act were merely directory, and that a general meeting could be called even if the corporation lacked certain officers. He also held, "that the existence of a board of directors *de facto* is sufficiently apparent upon the statements in the bill." In this discussion he said — "I have applied strictly the rule of making every intendment against the pleader in this case, . . . " also — ". . . I have felt bound in favor of the defendants to construe this bill with strictness."]

The second point which relates to the charges and incumbrances alleged to have been illegally made on the property of the company is open to the reasoning which I have applied to the first point, upon the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to, if the powers of the corporation may be called into exercise? But this part of the case is of greater difficulty upon the merits. I follow, with entire assent, the opinion expressed by the *Vice Chancellor* in *Preston v. The Grand Collier Dock Company*, that, if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill shewed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the

money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question, — the question of confirmation or avoidance, — cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point these demurrers must be allowed.

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### ATWOOL v. MERRYWEATHER.

1867. *L. R. 5 Eq. Cases*, 464, note.

THIS was a bill by the Plaintiff, on behalf of himself and all other the shareholders in the *East Pant Du United Lead Mining Company, Limited*, except the persons who were Defendants thereto, against *Samuel Merryweather, Henry Whitworth*, and the *East Pant Du Company, Limited*, for the purpose of setting aside a contract for the sale and purchase of certain mines (for the purpose of purchasing and working which the company was formed), and compelling repayment from *Merryweather* and *Whitworth* of the sum of £3940, or such portions as had been received by them, and a return of the 600 shares allotted to *Merryweather*.

The bill stated the incorporation, in 1863, of the company under the promotion of Defendants *Merryweather* and *Whitworth*, who published a prospectus stating that the company was formed “for the purpose of purchasing and working the extensive and valuable mining sets known as the *East Pant Du* and *Colomendy Lead Mines*,” and containing very favourable representations of the value of the mines, for the purchase of which the company was stated to have arranged for £7000 — £4000 to be paid in cash, and £3000 in shares of the company.

The capital was fixed at £30,000, divided into 6000 shares of £5 each; but only 2000 shares had been taken altogether, on which £3940 had been received. This money was paid to *Merryweather*, and 600 shares

were registered in his name as paid up, in part payment of the £7000, the alleged price of the mines.

Upon inquiries, the following circumstances were discovered in reference to the formation of the company: *Merryweather* applied to *Whitworth* to assist him in disposing of the mines in question, which he held under an agreement for a lease for twenty-one years, and had then discovered to be of no value. *Merryweather* proposed to dispose of his interest for £4000, and the scheme concocted between himself and *Whitworth* was, that a company should be formed for the purpose of purchasing and working the mines, which were to be sold to such company for £7000.

Of this money *Merryweather* was to get £4000, while the remaining £3000 was to be paid to *Whitworth* for his assistance in getting up the company. This agreement was concealed from the other directors, who were induced to believe that £7000 was *bonâ fide* to be paid as the purchase-money.

A committee appointed at a meeting of the 1st of June, 1864, recommended by their report that the undertaking should be abandoned, steps taken to relieve the company from any liability on the contract, and to recover back the money already paid by the shareholders.

At an extraordinary general meeting held on the 16th of June, 1864, a resolution was passed for receiving the report by a majority of the shareholders, and on the 30th of June, 1864, a bill was filed in the name of the company, alleging that the contract for the purchase of the mine had been fraudulently obtained by the Defendant *Merryweather*, and was void, and that he was not entitled to the 600 shares allotted to him in respect of it, and praying that the purchase of the mine might be set aside, and the money paid returned to the shareholders who had advanced it.

On the 6th of July *Merryweather* and *Whitworth* caused notices to be issued for a meeting of the board of directors "to consider the course to be taken in reference to the Chancery proceedings which have been instituted in the name of the company." At the meeting held on the 9th of July *Merryweather*, *Whitworth* and *Ashworth* (the three out of the six directors present at the meeting) passed a resolution that proceedings should be taken to get the bill taken off the file.

On the 1st of August, 1864, the Court was moved to take the bill off the file, but the motion was ordered to stand over until the next term in order to give an opportunity to call a general meeting of the shareholders of the company to take the matter into consideration. A meeting was accordingly held on the 12th of October, "for the purpose of taking the said bill into consideration, and adopting such resolutions in reference thereto as the meeting may determine upon."

A resolution was proposed for adopting and continuing the Chancery proceedings, whereupon an amendment was proposed by *Whitworth* for referring all matters in difference between the shareholders and

*Merryweather* to arbitration, and for staying all legal proceedings. This amendment was lost by 11 votes to 4 upon a show of hands, and the original resolution was carried by 10 to 4. A poll having been demanded upon the amendment, proxies were produced, and 14 persons, holding altogether 1070 shares and 324 votes, voted against the amendment, and 12 persons, holding 1490 shares and having 344 votes, voted for the amendment. But excluding the votes of the Defendants *Merryweather* and *Whitworth*, there was a majority of 86 votes against the amendment, and excluding only the votes of *Merryweather* there was a majority against it of 58 votes. The motion to take the bill off the file was renewed, and on the 5th of December, 1864, the Vice-Chancellor Sir *W. P. Wood* directed the bill to be taken off the file, but made no order as to the costs of the motion. (See 2 H. & M. 254.)

The present bill, which was filed on the 14th of December, 1864, by a holder of 100 shares in the company (purchased on the faith of the statements contained in the prospectus), suing on behalf of himself and all other the shareholders in the *East Pant Du Company*, except the Defendants, against *Merryweather*, *Whitworth*, and the company as Defendants, alleged that none of the shareholders in the company other than the Defendants were desirous that the contract with *Merryweather* should be carried into effect, or that the relief prayed should not be granted; that the Defendants had altogether 106 votes as shareholders in the company, and obtained the proxies of the other shareholders who voted for the amendment by entering into engagements to indemnify them against loss; "and such votes, together with the aforesaid 106 votes of the said Defendants, constitute a majority of the shareholders' votes in the company."

The bill also alleged, that even without such proxies the 106 votes held by the Defendants made it impossible to obtain a fair decision at a general meeting.

The bill further charged, that the contract was obtained by misrepresentations as to the value, with full knowledge by the Defendants that the mines were worthless, that £4000 was an exorbitant price for them, and that no other portion of the £7000 was ever intended to be treated as purchase-money of the mines, but was intended to be paid to *Whitworth*, the Defendants having become promoters of the company solely for the purpose of raising the £7000 for their own private benefit; that these facts were fraudulently concealed from the other directors and shareholders, and that if they had been disclosed the company never would have contracted to purchase the mines. The bill prayed that the contract for the purchase of the mine might be set aside, and a return of the money and shares received by *Whitworth* and *Merryweather*; and an injunction to restrain any proceeding to recover the balance of the purchase-money; compensation for all damage and loss occasioned to the company, and, if necessary, that the company might be dissolved and wound up under the direction of the Court.

Mr. *Kay*, Q. C., and Mr. *Fry*, for the Plaintiff : —

A sufficient case of fraud, collusion, and suppression has been shewn to enable the Court to set aside the contract, and it is competent for an individual shareholder to maintain a suit for setting aside the contract, even if such suit were opposed by a majority of the shareholders. But that is not the case here, as, by excluding the votes of *Merryweather*, there is a majority in favour of setting aside the purchase and winding up the company : *Bromley v. Smith* (1 Sim. 8) ; *Preston v. Grand Collier Dock Company* (11 Sim. 327) ; *Hichens v. Congreve* (4 Russ. 562) ; *Beck v. Kantorowicz* (3 K. & J. 230) ; *Lovell v. Hicks* (2 Y. & C. Ex. 46, 481).

Mr. *Druce*, Q. C., and Mr. *A. E. Miller*, for *Merryweather's* assignee : —

Upon the frame of the suit, the contract is not void, but merely voidable, and the majority of the shareholders may confirm it, and bind the whole body for that purpose. The suit, therefore, in its present form, is improperly framed : *Foss v. Harbottle* (2 Hare, 461, 494) ; and the proper course would have been for the Plaintiff to have filed a bill for leave to use the name of the company against the parties to the contract. Assuming the price paid for the mine to have been excessive, the Plaintiff may have a case for making the directors account, but that affords him no *locus standi* as against the vendors for setting aside the contract : *Pulsford v. Richards* (17 Beav. 87) ; *Fraser v. Whalley* (2 H. & M. 10).

Mr. *Horsely*, for *Whitworth's* assignee.

Mr. *Charles Hall*, for the company.

SIR W. PAGE WOOD, V. C. : —

I think that, upon principle, a contract of this kind cannot stand, and that there is not such a defect in the constitution of the suit as would be fatal according to the authority of *Foss v. Harbottle* (2 Hare, 461).

Looking at the facts as they come out, I am clearly of opinion that this arrangement, by which *Merryweather* was to have £4000 and *Whitworth* £3000, was concealed from everybody, and that *Merryweather* assisted in that concealment by allowing his name to appear as the sole vendor, and taking the purchase-money.

Upon such a transaction the Court will hold that the whole contract is a complete fraud. I do not in the least say that where persons with their eyes open know that the agent who secures them the bargain is going to take money for it, that would not be all right enough. If the company knew this gentleman was to have this amount as promotion-money, well and good. There might have been some difficulty, Mr. *Whitworth* being a director, if it had been a sale by *Merryweather* and *Whitworth eo nomine*, both of them together. If that had been the case more might have been said about the frame of the suit. But here it is a simple fraud, and nothing else. *Merryweather* knowing *Whitworth's* position with regard to the company, and that as an honest



man *Whitworth* was bound to tell the company what price he bought the mines for, agreed that the mine should be sold to the company for £7000, and that the real price, £4000, should not be disclosed to the company.

With regard to the frame of the suit, a question of some nicety arises how far such relief can be given at the instance of a shareholder on behalf of himself and other shareholders on the ground that the transaction might be confirmed by the whole body if they thought fit, and that the case would fall within *Foss v. Harbottle*, according to which the suit must be by the whole company. On the previous occasion, when it was desired to take proceedings to set aside this transaction, a gentleman took upon himself to file a bill in the name of the company. A motion was made to take that bill off the file, as the person filing the bill was not the solicitor of the company, and was not authorized to file the bill, and I ordered the bill to be taken off the file. There was a majority against setting aside this transaction. The number of votes for rescinding the transaction was 324, and 344 the other way. But *Merryweather*, in respect of the shares obtained by this sale, which I have held cannot stand, had 78 votes, and *Whitworth* 28, making altogether 106 out of the 344. If I were to hold that no bill could be filed by shareholders to get rid of the transaction on the ground of the doctrine of *Foss v. Harbottle*, it would be simply impossible to set aside a fraud committed by a director under such circumstances, as the director obtaining so many shares by fraud would always be able to outvote everybody else. I held on a former occasion, and I adhere to that decision, that the Court must first be satisfied that the Plaintiffs were authorized to call themselves the company, the solicitor who put the bill upon the file having no retainer under the corporate seal.

This bill being filed by the Plaintiff on behalf of himself and the other shareholders, it is suggested that the proper course would be to file a bill on behalf of himself and the other shareholders for leave to use the name of the company, in order to set aside that contract. I do not think that circuitous course is necessary under any circumstances. It is quite clear that it is not necessary here, because in this case the purchase of the mines is the only thing for which this company was incorporated. It appears to me that it would not be competent for a majority of the shareholders against a minority to say that they insist upon a matter of that kind where the whole inception of the company is simply a motion by a fraudulent agent, *quod* director, to confirm a purchase as made for £7000, which was made for £4000. The whole thing was obtained by fraud, and the persons who may possibly form a majority of the shareholders, could not in any way sanction a transaction of that kind.

I think in this particular case it is hardly necessary to rely upon that, because, having it plainly before me that I have a majority of the shareholders, independent of those implicated in the fraud, supporting

the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and *pro forma* have a totally different litigation. The only course now to take is to set aside the contract for sale and purchase of the mines, and cancel the agreement for such sale. The purchase-money must be repaid with interest, and the share certificates given to *Merryweather*, delivered up. The profits made by the company to be set off, and the company to have a lien for the balance. I shall also declare that the company ought to be wound up.

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BRONSON ET AL. *v.* LA CROSSE & MILWAUKIE RAILROAD CO. ET ALS.

1863. 2 *Wallace*, 283.<sup>1</sup>

BILL in equity, in U. S. Circuit Court for District of Wisconsin, to foreclose a mortgage made by La Crosse & Milwaukie R. Co.

The Milwaukie & Minnesota R. Co. was also made a party defendant. This company had been organized upon a sale of the La Crosse & Milwaukie R. Co. under another mortgage, junior to that under which the present plaintiffs claim. The Milwaukie & Minnesota R. Co. did not appear, but permitted the bill to be taken as confessed.

After the time had expired within which the Milwaukie and Minnesota Railroad Company ought to have answered, but before an order had been entered taking the bill against them *pro confesso*, one J. S. Rockwell, a stockholder of the said company, presented to the court his petition, charging collusion between the complainants or their agents and one Russell Sage; President of the said Milwaukie and Minnesota Company, to secure a foreclosure and sale in their cause, for the purpose of extinguishing the rights of the said Milwaukie and Minnesota Company, which was alleged to be the owner of the equity of redemption of the mortgaged premises; and that the President of the said last-named company, although requested by its stockholders, had declined to make any defence in this cause. The petition prayed leave to defend the bill, "*on the part of said company*", as a defendant therein, and to be let in and allowed to make such defence as he may be advised is proper or necessary, in the place of said company, as a party defendant to said action, and for a reasonable time to prepare and file his answer." Upon this petition, the court "ordered that the said Rockwell be, and hereby is, allowed to make defence to this bill in the name of said Milwaukie and Minnesota Railroad Company, to the same extent as *the said company could do*, under the rules and practice of this court." In pursuance of this order, Rockwell filed his

<sup>1</sup> Statement abridged, arguments omitted. Only so much of case is given as relates to one point. — ED.

answer, entitled "The separate answer of J. S. Rockwell, who, by the order of this court, is allowed to make defence to the bill, &c., in the name of the Milwaukie and Minnesota Railroad Company." This answer was signed by Rockwell individually.

Fleming, another stockholder of the Milwaukie and Minnesota Company, presented a petition, charging collusion, as before charged in the petition of Rockwell, apparently upon the theory that Rockwell's was his individual answer, and not that of the company, and praying leave "to put in an answer for said Milwaukie and Minnesota Railroad Company, and that said company may have thirty days' time to perfect the same, and *prepare a cross-bill as shall be necessary.*" Upon this petition, the court "ordered that the said Fleming have leave to put in answer *in the name of the Milwaukie and Minnesota Railroad Company.*" Under this order, Fleming filed an answer, entitled, "The answer of the Milwaukie and Minnesota Railroad Company, one of the defendants to the bill," &c. This answer was signed "The Milwaukie and Minnesota Railroad Company, by A. Fleming, stockholder;" and also, "A. Fleming, stockholder of the Milwaukie and Minnesota Railroad Company." The complainants filed replications to these answers, entitled "Replications, &c., to the answer of J. S. Rockwell," and "Replication, &c., to the answer of the Milwaukie and Minnesota Railroad Company."

*Mr. Carpenter*, for defendants.

*Messrs. Carlisle and J. S. Brown*, *contra*.

NELSON, J. As the two stockholders (Rockwell and Fleming), though not made defendants by the bill, were permitted, by leave of the court, to appear and put in answers in the name of the Milwaukie and Minnesota Company, it is material to inquire into the effect to be given to them. That they cannot be regarded as the answers of the corporate body is manifest, as a corporation must appear and answer to the bill, not under oath, but under its common seal. And an omission thus to appear and answer according to the rules and practice of the court, entitle the complainants to enter an order that the bill be taken *pro confesso*. A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the inequality that would exist between the parties to the litigation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer or stipulations that might be entered into by the parties or their counsel. It is thus apparent, that while the name of the corporation is thus used as a real party in the litigation so far as the rights and interests of the complainants are concerned, it is an unreal and fictitious party so far as respects any obligation or responsibility on the part of the respondents.

It is insisted, however, that the directors of this company refused to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and, hence, the

necessity, as well as the propriety and justice, of permitting the defence by a stockholder in their name.

Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case, the court in its discretion will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defence. But this defence is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong. A complainant, if he chooses, may compel a corporation to appear and answer by a writ of *distringas*; or he may join with the corporation, a director, or officer, if he desires a discovery under oath. But we are not aware of any other except a complainant who can compel an appearance or answer.

Now, although the appearance and answers of the stockholders (Rockwell and Fleming) were irregularly allowed by the court, as each was permitted to appear and answer in the name of the company, yet, as the defence set up is doubtless the same as that which they would have relied on if they had been admitted simply as stockholders, we are inclined to regard the answers the same as if put in by them in that character, in the further views we shall take of the case. Each one swore to the truth of his answer in the usual way.

[Remainder of opinion omitted.]

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## DAVENPORT v. DOWS.

1873. 18 *Wallace* (U. S.), 626.

APPEAL from the Circuit Court for the District of Iowa.

Dows, a citizen of New York, in behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island, and Pacific Railroad Company, filed a bill in the court below against the city of Davenport, and its marshal, to arrest the collection of a tax, alleged to be illegal, levied by the said city for general revenue purposes, on the property of the company within its limits. The bill

assigned as a reason for its being filed by Dows, a stockholder in the company, instead of by the company itself, that the company neglected and refused to take action on the subject. A demurrer was interposed to the bill, which was overruled, and on the defendants refusing to answer over, the Circuit Court ordered that the collection of the tax be perpetually enjoined. From this, its action, the defendants appealed, insisting that the Circuit Court erred in overruling the demurrer, for three reasons:

*First.* Because the railroad company was not made a party to the bill.

*Second.* Because the complainant had a complete remedy at law; and,

*Third.* Because the tax in question was a proper charge against the property of the corporation.

*Mr. J. N. Rogers for the appellants; Mr. T. F. Witherow, contra.*

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to notice the last two reasons assigned, why the demurrer should not have been overruled, as the first is well taken. Indeed, it would be improper to pass on the merits of the controversy until the proper parties to be affected by the decision are before the court.

That a stockholder may bring a suit when a corporation refuses is settled in *Dodge v. Woolsey*,<sup>1</sup> but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.<sup>2</sup>

In this case the tax sought to be avoided was assessed against the Chicago, Rock Island, and Pacific Railroad Company, and the decree rendered discharges the company from the payment of this tax. The

<sup>1</sup> 18 Howard, 340.

<sup>2</sup> *Robinson v. Smith*, 3 Paige, 222, 233; *Cunningham v. Pell*, 5 Id. 607; *Hersey v. Veazie*, 24 Maine, 1; *Charleston Insurance and Trust Co. v. Sebring*, 5 Richardson, Equity, 342; *Western Railroad Co. v. Nolan*, 48 New York, 573; *Bagshaw v. Eastern Union Railroad Co.*, 7 Hare, 114-131.

corporation, therefore, should have been made a party to the suit, and as it was not, the demurrer should have been sustained.

DECREE REVERSED, and the cause remanded for further proceedings,  
*In conformity with this opinion.*

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## HAWES v. OAKLAND.

1881. 104 U. S. 450.<sup>1</sup>

APPEAL from the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

*Mr. Charles N. Fox* for the appellant.

*Mr. Henry Vrooman* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree in chancery dismissing the complainant's bill, wherein he, a citizen of New York, alleges that he is a stockholder in the Contra Costa Water-works Company, a California corporation, and that he files it on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the suit.

The defendants are the city of Oakland, the Contra Costa Water-works Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, and John W. Coleman, trustees and directors of the company.

The foundation of the complaint is that the city of Oakland claims at the hands of the company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the company comply with this demand, to the great loss and injury of the company, to the diminution of the dividends which should come to him and other stockholders, and to the decrease in the value of their stock. The allegation of his attempt to get the directors to correct this evil will be given in the language of the bill.

He says that "on the tenth day of July, 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water

<sup>1</sup> Portions of opinion omitted. — ED.

from the works of said company for any other purpose without compensation; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer, great loss and damage."

To this bill the water-works company and the directors failed to make answer; and the city of Oakland filed a demurrer, which was sustained by the court and the bill dismissed. The complainant appealed.

Two grounds of demurrer were set out and relied on in the court below, and are urged upon us on this appeal. They are:—

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.

2. That by a sound construction of the law under which the company is organized the city of Oakland is entitled to receive, free of compensation, all the water which the bill charges it with so using.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in *Dodge v. Woolsey* (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard,

which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of *Dodge v. Woolsey* permits the



stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.

[The learned judge here cited, and commented on, various cases; especially *Foss v. Harbottle*, 2 Hare, 461; *Gray v. Lewis*, L. R. 8 Chan. Ap. 1035; *MacDougall v. Gardiner*, L. R. 1 Chan. Div. 13; and *Dodge v. Woolsey*, 18 Howard, 331. The opinion then proceeds as follows:]

This examination of *Dodge v. Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit —

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, or of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which *forbids* the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance; namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The direc-

tors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity — no right in himself to prosecute this suit.

*Decree affirmed.*<sup>1</sup>

## MENIER v. HOOPER'S TELEGRAPH WORKS.

1874. L. R. 9 Chan. Ap. 350.

THE bill in this case was filed by *E. J. Menier*, on behalf of himself and all other the shareholders of the *European and South American Telegraph Company* (except such of them as were Defendants), against a company called *Hooper's Telegraph Works*, *W. Hooper*, *H. W. Crace*, and the *European and South American Telegraph Company*, and stated (amongst other things) as follows: — That the *European Company* was incorporated in 1871 with the object of carrying out an agreement between the Plaintiff, *Menier*, and one *Bradford*, and others, for constructing a submarine telegraph from *Europe* to *South America*, under certain conventions and decrees of foreign governments. The capital of the company was to be £1,250,000, in 62,500 £20 shares, and by the articles of association provisions were made for holding meetings of the company, at which every member was to have one vote for every share held by him. That *Hooper's Company* were to make and lay down for the *European Company*

<sup>1</sup> The following "Additional Rule of Practice in Equity," No. 94, was promulgated by the U. S. Supreme Court, Jan. 23, 1882, and is printed in vol. 104 U. S. Preface, ix. : —

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

telegraph cables from *Portugal* to *Brazil*. That a prospectus was issued and many shares were applied for, but in consequence of objections raised the directors determined not to proceed with the allotment to the public, and the only shares allotted were 3000 to *Hooper's Company*, 2000 to the Plaintiff, and 325 to thirteen persons, ten of whom were the directors. That £3 was paid on each of the shares so allotted. That one of the concessions for making the telegraph had been granted to the Baron de *Maua*, who was at one time chairman of the *European Company*, and this concession was claimed by the *European Company*. That a bill was filed in this Court by the *European Company* against the Baron de *Maua* and another company, praying a declaration that the Baron de *Maua* was a trustee of the concession for the *European Company*, and that he might be restrained from transferring it to any one else. That a motion was made for an interlocutory injunction, and was refused by the Vice-Chancellor *Malins*, but on the balance of convenience only. That the *European Company*, and also *Hooper's Company*, at first intended to appeal against the order of the Vice-Chancellor *Malins*. That *Hooper's Company* afterwards determined not to appeal, and then the directors of the *European Company* determined not to appeal, but to take steps for winding up the *European Company*. That the Plaintiff was resident in *Paris* and ignorant of English law, and believed that any arrangements adopted by the directors would be for the benefit of the *European Company*, and not, exclusively in the interests of *Hooper's Company*. That the Plaintiff wished the appeal to proceed, and offered to bear the costs. That on the 12th of February, 1873, an extraordinary meeting of the *European Company* was held, at which a resolution was passed that the company be wound up voluntarily, and that the Defendant *Crace* be the liquidator. That the resolution was proposed by one *Kennedy*, a director of *Hooper's Company*, and that *Crace* was secretary of *Hooper's Company*. That this resolution was confirmed at another extraordinary meeting, at which five persons only were present, of whom three were directors nominated by *Hooper's Company*, and one was *Crace*, the secretary. That the Plaintiff protested against these proceedings. That the Plaintiff was then ignorant, but had since discovered, that these proceedings took place through the influence of *Hooper's Company*. The bill then stated the circumstances of an arrangement between *Hooper's Company* and the *Telegraph Construction and Maintenance Company* and the Baron de *Maua*, under which it would be to the advantage of *Hooper's Company* that the agreement between them and the *European Company* should be put an end to, in order to benefit Baron de *Maua's Company*, and in order that *Hooper's Company* might sell to another company the cable they were making for the *European Company*. That these arrangements were concealed from the Plaintiff and the other shareholders in the *European Company*. That *Hooper's Company* procured the abandonment of the suit against the Baron de *Maua*, and the winding-up of the *European*

*Company*, through the influence which they had as holders of 3000 shares in the *European Company*, and through the influence of the directors nominated by them.

And the bill prayed that *Hooper's Company* might be declared not entitled to the benefit of the profits derived from the abandonment of the suit and other arrangements aforesaid, and might be declared a trustee of those profits for the Plaintiff and the other shareholders in the *European Company*; and that the *European Company* and the Defendants might be restrained from repaying to *Hooper's Company* any of the money paid on the allotment of shares in the *European Company*, and from disposing of the property of the *European Company*.

To this bill the Defendants *Hooper's Company* and *W. Hooper* demurred for want of equity; and the Defendants *Crace* and the *European Company* also demurred, and for cause of demurrer shewed that the Plaintiff had not made out such a case as entitled him to discovery or relief.

The Vice-Chancellor *Bacon*, on the 12th of January, 1874, overruled both demurrers; and the Defendants appealed.

Mr. *Fry*, Q. C., and Mr. *Millar*, for *Hooper's Company*:—

A shareholder has a right to vote as he pleases, and to suit his own interests. If not, the Court in every case might have to interfere wherever there was a small majority, and consider what were the motives of each shareholder. If there was a suit by the company against any individual shareholder, he would not be disabled from voting. He is not a trustee for any one, and he may vote against the interests of the company or of any of the other shareholders. No constructive trust can be raised: *Gray v. Lewis*.<sup>1</sup> In *Atwood v. Merryweather*<sup>2</sup> the vote was impeached. If such a suit can be maintained, one shareholder may file a bill to have a certain contract set aside, and another to have it carried on. Such a suit can only be maintained by the company against the directors. At all events, the proceedings ought to be in the liquidation, and not by bill.

Mr. *Kay*, Q. C., Mr. *Jackson*, Q. C., and Mr. *Everitt*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L. J.:—

I am of opinion that the order of the Vice-Chancellor in this case is quite right.

The case made by the bill is very shortly this: The Defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. *Hooper's Company* have obtained certain advantages by dealing with something which was the property of the whole company. The minority of the shareholders say in effect that

<sup>1</sup> Law Rep. 8 Ch. 1035.

<sup>2</sup> Law Rep. 5 Eq. 464, n.

the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them.

It is said, however, that this is not the right form of suit, because, according to the principles laid down in *Foss v. Harbottle*,<sup>1</sup> and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper Plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in *Atwood v. Merryweather*,<sup>2</sup> a case in which the majority were the Defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders.

Therefore the demurrer ought to be overruled.

SIR G. MELLISH, L. J.: —

I am entirely of the same opinion.

It so happens that *Hooper's Company* are the majority in this company, and a suit by this company was pending which might or might not turn out advantageous to this company. The Plaintiff says that *Hooper's Company* being the majority, have procured that suit to be settled upon terms favourable to themselves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them. I also entirely agree that, under the circumstances, the suit is properly brought in the name of the Plaintiff on behalf of himself and all the other shareholders.

The appeal will be dismissed with costs.

Mr. *Fooks*, Q. C., and Mr. *Davey*, for the other Defendants, then submitted to have their appeal dismissed.

<sup>1</sup> 2 Hare, 461.

<sup>2</sup> Law Rep. 5 Eq. 464, n.

## JESSEL, M. R., IN RUSSELL v. WAKEFIELD WATERWORKS CO.

1875. *L. R. 20 Eq. Cases*, 474, 478-483.

SIR G. JESSEL, M.R. A great deal of the argument in this case turned upon what may be described perhaps, in one sense, as a technical objection, but which is a very formidable and important objection. It was said that this is a bill to make a stranger pay back money belonging to a company which the stranger has illegally or improperly possessed himself of, or appropriated to his own use, and that any person who takes possession of a trust fund is liable to be sued in equity by the owner of the trust fund if he had notice at the time that it was a trust fund; and although he gave value, still in that way the bill can be maintained against him.

The answer was, that where the owner of the trust fund is an incorporated company, the corporation is the only party to sue; the stranger has nothing whatever to do with the individual corporators; and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property, but the property of the corporation, and therefore the right person to sue is the corporation, who is the *cestui que trust* or equitable owner of the fund. That I take to be the general rule of this Court. In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.

But the general rule being that the *cestui que trust* must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule.

[After referring to the general rule laid down in *Foss v. Harbottle*, 2 Hare, 461.] But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice.

It remains to consider what are those exceptional cases in which, for the due attainment of justice, such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of

the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in a case of *Simpson v. Westminster Palace Hotel Company*.<sup>1</sup> If the subject matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a Defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the Court the other corporation.

The cases are so numerous on this subject, that one ought not perhaps to refer to them. But I may mention a few of them. There is, first, the well-known case of *Hare v. London and North-Western Railway Company*; <sup>2</sup> there is the case of *Simpson v. Denison*; <sup>3</sup> there is a case of *Beman v. Rufford*; <sup>4</sup> and a vast number of cases as regards agreements between Railway companies which have been held to be *ultra vires*. When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the *ultra vires* agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, as in the case of *Salomons v. Laing*,<sup>5</sup> and you may be entitled to have property returned or other acts done. If the detainer or holder of the money or property, that is, the second corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the Court were to say it could do justice in a suit so framed by ordering the money to be returned or the property restored. It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and that has always been the practice of the Court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.

Another instance occurred in the case of *Atwool v. Merryweather*,<sup>6</sup> in which the corporation was controlled by the evil-doer, and would not allow its name to be used as Plaintiff in the suit. It was said that justice required that the majority of the corporators should not appropriate to themselves the property of the minority, and then use their

<sup>1</sup> 8 H. L. C. 712.

<sup>2</sup> 10 Hare, 51.

<sup>3</sup> 12 Beav. 377.

<sup>4</sup> 2 J. & H. 80.

<sup>5</sup> 1 Sim. (N.S.) 550.

<sup>6</sup> Law Rep. 5 Eq. 464, n.



own votes at the general meeting of the corporation to prevent their being sued by the corporation, and consequently in a case of that kind the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned judge who decided the case of *Foss v. Harbottle*.<sup>1</sup>

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### BURT v. BRITISH, &c. ASSOCIATION.

1859. 4 *De Gex & Jones*, 158.<sup>2</sup>

APPEAL by plaintiff from the dismissal of his bill by Vice-Chancellor STUART.

Plaintiff sued on behalf of himself and all other shareholders, except those made defendants. The bill sought to set aside various transactions of certain persons with the association.

*Greene and Bromehead*, for appellant.

*Malins, Thring, W. W. Cooper, Bacon, and H. R. Bagshawe*, for various defendants.

KNIGHT BRUCE, L. J. [The learned Judge found, upon evidence, that the plaintiff, who had been a director of the association, having had knowledge of the transactions now complained of, had so conducted himself that he must be regarded as having acquiesced in and confirmed these transactions. The opinion then proceeds as follows:]

I am of opinion, however, looking only at what took place in *December*, 1856, that by the conduct of the Plaintiff at that time, and

<sup>1</sup> 2 Hare, 461.

<sup>2</sup> Statement abridged. Only so much of opinion is given as relates to one point — Ed.

his conduct afterwards, he has precluded himself from any right of complaint, whatever right of complaint others may have, either as against the Defendants or as against the Plaintiff himself.

As to that it is not necessary to give an opinion. He has sued on behalf of himself and others, and notwithstanding what has been contended on the part of the Defendants, I assume that there still exist persons who have a right to complain of these transactions. But that will not give the Plaintiff a title to sue for them. As on one hand a Plaintiff, who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested though no other may wish to sue, so, although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a Plaintiff only, who has personally precluded himself from suing, that suit cannot proceed. The present case in my opinion stands upon the same footing as if the dissatisfied shareholders (supposing them to be dissatisfied) had sued by a Plaintiff who had released the Defendants. For that in my opinion is the position in which effectually Mr. *Burt* has placed himself.

Whether, therefore, agreeing or disagreeing with the particular ground on which his Honor the Vice-Chancellor has proceeded, I apprehend that the grounds which I have stated are amply sufficient to render a dismissal of the bill necessary.

TURNER, L. J., concurred.

## WILLOUGHBY v. CHICAGO JUNCTION, &c. CO.

1892. 50 *New Jersey Equity* (5 *Dickinson*), 656.<sup>1</sup>

ON rule to show cause why an injunction should not issue. Heard on bill, supplemental bill, answers and affidavits, and on subsequent stipulation that the cause should be disposed of as having been heard on final hearing.

The original bill was filed Dec. 17, 1891, by Willoughby, on behalf of himself, as a stockholder in the Chicago Junction &c. corporation (called by the court the New Jersey Co.), and all other stockholders therein, who should come in and contribute to the expense of the suit. Three other stockholders were afterwards, by an order of court, admitted as parties complainant. The aforesaid corporation and certain other parties were made defendants. The object of the original bill was to restrain defendants from carrying into execution an agreement between the New Jersey Co. and certain other defendants, dated July

<sup>1</sup> Statement abridged. Portions of opinion omitted. — Ed.

27, 1891. Before a hearing on this bill, another agreement was entered into between the New Jersey Co. and the same parties, dated Jan. 15, 1892, which, while it contained many of the provisions of the former agreement, yet by its fourteenth paragraph expressly annulled such former agreement. Thereupon Willoughby and his three co-plaintiffs, by leave of the court, filed a supplemental bill against the same defendants, setting out the fact of the original suit, and, as far as proper, incorporating the original bill, and seeking to restrain the carrying into effect both the agreement of Jan. 15, 1892, and that of July 27, 1891.

Ellerman, another stockholder of the New Jersey Co., on Aug. 19, 1891, filed a bill in this court, on behalf of himself, and of all other stockholders who should come in and contribute to the expense of the suit, for the purpose of preventing the consummation of the same agreement of July 27, 1891. Ellerman's suit was heard before a vice-chancellor on bill and answers; an opinion was filed Dec. 18, 1891 (49 N. J. Eq. 217), holding that said agreement was not *ultra vires* the corporation and not illegal; and a decree was entered dismissing the bill on that ground.

*Aaron P. Whitehead, Frederic W. Stevens, and Thos. N. McCarter*, for plaintiffs.

*R. Wayne Parker, Cortlandt Parker, Joseph H. Choate, Wm. D. Guthrie, and Barker Gummere*, for various defendants.

GREEN, V. C. [After stating the case.] Assuming that such decree is not impeachable for fraud, collusion or other vice, to what extent, if at all, is the decision of questions in the Ellerman suit conclusive in this action?

Mr. Black, in his work on *Judgments*, thus states the general rule (§ 504):

“A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.”

As the rule in question is generally stated, the former judgment is binding only on parties and their privies, but the course of decision has been such as to embrace others who do not stand in a relation, strictly speaking, of privity with the original party, as a sheriff and his deputy, *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 657); master and servant, in an action of trespass, *Emery v. Fowler*, 39 Me. 326 (63 Am. Dec. 627); the joint and several makers of a promissory note, *Spencer v. Dearth*, 43 Vt. 98; the true owner, and the bailee of complainant, *Bates v. Stanton*, 1 Duer. 79; a chattel mortgagee and the vendee of the mortgaged goods, *Atkinson v. White*, 60 Me. 396; a town and parties alleged to have caused an obstruction to the highway, in an action for negligence, *Hill v. Bain, Town Treas.*, 15 R. I. 75

(23 *Am. Rep.* 44) ; see, also, *Durham v. Giles*, 52 *Me.* 206 ; *Freer v. Stotenbur*, 2 *Abb. Ct. of App.* Dec. 189.

Chief Justice Durfee, in *Hill v. Bain*, referring to some of the cases, says (at p. 77) :

"In these cases the defendants were permitted to avail themselves, by way of estoppel, of judgments to which they were neither parties nor privies. The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties that the judgments, when recovered, could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of record."

*Black on Judgments* (§ 537) thus states the rule as to the parties affected :

"It is not always necessary that the parties to the two suits should be nominally the same in order that one recovery may bar another. It is in general sufficient if they are really and substantially in interest the same."

And Mr. Freeman, in his work on *Judgments*, thus (§ 154) :

"Persons who were parties to the suit, or in privity with such party, or in such a position that they were the real parties in interest in the litigation conducted for their benefit in the name of another, under such circumstances as to make them answerable for the result of the litigation by virtue of the principles to be hereinafter stated."

The practice has long been recognized of permitting suit to be brought by a few as the representatives of a numerous class, on behalf of themselves and all others of the class, when there is a common interest or a common right which the suit seeks to protect, and against a few as representing a numerous class subject to a common liability which the suit seeks to enforce. *Story Eq. Pl.* § 97.

"In most, if not in all, cases of this sort, the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament, the court taking care that sufficient persons are before it, honestly, fairly and fully to ascertain and try the general right in contest." *Story Eq. Pl.* § 120.

[The learned Judge then stated the cases of *Harmon v. Auditor*, 123 Ill. 122 ; *Gaskell v. Dudley*, 6 Metcalf, 546 ; and *Davey v. St. Albans Trust Co.*, 60 Vt. 1.]

None of these cases, it is true, is exactly in point, but they show clearly how elastic is the rule limiting the conclusive character of judgments to parties and their privies. How does the question stand on principle?

Actions of the class to which the Ellerman and Willoughby suits belong are *sui generis*, in this, that the complainant does not prosecute in his own right—a stockholder, as such, does not have a legal or equitable estate in the corporate property ; his only right of property is to a proportionate share of the profits of the business while the company is in operation, and to a proportionate share of the net assets on

its dissolution. Unauthorized dealing with the franchises or funds of the corporation directly injure it as a legal entity; it is the franchises of the corporation which are to be misused, the funds of the corporation which are to be misappropriated, and the corporation is, therefore, the party to be injured and should itself seek redress. This class of cases must not be confounded with the preventive remedy of every stockholder to restrain acts *ultra vires* the corporation. While "the directors are *quasi* or *sub-modo* trustees for the corporation with respect to the corporate property, they are also *quasi* or *sub-modo* trustees for the stockholders with respect to their shares of the stock." 3 *Pom. Eq. Jur.* § 1090.

Each stockholder has invested his money in the very enterprise contemplated by the charter, and has, in his own right, an equitable remedy to prevent his *quasi*-trustees, as directors, from misuse of the corporate franchises, and from diversion of corporate funds, to a purpose foreign to that of the charter, and for which he has invested his money, and this although every other stockholder favors the proposed action, and it is plainly advantageous to the financial interests of the company.

The Ellerman and Willoughby suits belong not to this, but to that class of cases in which the corporation itself is directly injured and is primarily interested, and should itself institute and maintain an action for relief; in which the remedy to be obtained, whether pecuniary or otherwise, is for its benefit and belongs to it alone; the stockholder in such case has no standing in the court, as a party, except on the refusal, either express or implied, of the corporation itself to prosecute.

Where, as in this case, an appeal to the directors to bring suit would apparently be unavailing, refusal to prosecute is implied, and a stockholder is permitted to commence the action in his own name; but otherwise the suit is treated in every respect as one brought by and for the corporation; although the stockholder is the nominal, the corporation is the real party complainant, represented not by its accustomed officials, but by one or more of its stockholders.

Professor Pomeroy (3 *Eq. Jur.* § 1095) says, with reference to such a suit:

"Wherever a cause of action exists primarily in behalf of the corporation against directors, officers and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation *either actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The *rationale* of this rule should not be misapprehended.

The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought; he is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as a representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation; it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably necessary party, not *simply* on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy, nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice."

*Cook on Stockholders* (1st ed.) § 692, says:

"The rule that the corporation itself is an indispensable party defendant to such suit, is due to the fact that all other possible future suits by the corporation are thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others."

Neither this suit nor the Ellerman suit was in the right of the respective complainants; they were the nominal, but not the real, parties complainant. They were suing merely as representing the company, to establish and enforce its rights; the relief to be obtained was not and is not for their individual benefit, but for the benefit of the corporation as such. In these cases the corporation itself is a necessary and was and is actually a party defendant; in these it was and is represented by counsel, answered the bills and has taken part by counsel, in the discussion of the case. The decree in the Ellerman suit certainly binds the company. In the face of that decree, neither the old nor a new board of directors could attack it except by an appeal. The former decree could be successfully pleaded as a bar to an action instituted in the name of the company by authorized agents who might desire to relitigate the questions decided. If the company and its authorized representatives are then concluded by such a decree, how can a stockholder, suing in behalf of the company, be permitted to relitigate questions which are conclusive upon the corporation? A stockholder has no standing in the court to prosecute such an action except on the refusal of the directors, either actual or presumptive, to prosecute. But such refusal of the directors to prosecute must be an unjustifiable refusal. If their reason for not doing so is a valid one,

the individual stockholder cannot, from such refusal derive a right to prosecute in his own name. It would not be unreasonable or unjustifiable for a board of directors to refuse to prosecute, on the application of a stockholder, when there had been an adjudication on the point which he seeks to have passed upon, which is conclusive upon the company. And if the stockholder in the face of a refusal by the directors on that ground should persist and commence the action, an answer by the directors in his suit, that they had refused to bring the action solely on the ground that the question had been before adjudicated, would necessarily be followed by a dismissal of his bill. This argument goes to the root of this question, and demonstrates that the decision of questions litigated in this court in the suit brought by Elleman, a stockholder, in his own behalf and that of other stockholders, in which the company was made a defendant and appeared, is conclusive in another suit brought by another stockholder for the purpose of relitigating the questions which have been determined. If not so there can be no end of litigation, for the court is then open to suit by every stockholder, *seriatim*, presenting the questions over and over for consideration and decision.

In *Dannmeyer v. Coleman*, 11 *Fed. Rep.* 97, Sawyer, C. J., says: "By reference to *Burke v. Flood*, *supra*, it will be seen that a similar suit for these same grievances was brought by a single stockholder, Burke, on behalf of himself and all other stockholders—and it is a notorious, historical fact, of which the daily newspapers have been full, that these are not the only suits brought in the same way for the same grievances. Is each holder of one of these five hundred and forty thousand shares of stock entitled to bring a suit in equity on behalf of himself and all other stockholders for an account of their transactions? Or, where such a suit has been brought by one stockholder, must the others come in and seek their relief in that suit? If each stockholder is entitled to bring such a suit, then there is something wrong in the law, and the sooner the supreme court by rule, or congress by statute, regulates the matter the better it will be for the due administration of justice."

It is urged that no party should be concluded without an opportunity to be heard; but this complaint does not lie in the mouth of Mr. Willoughby. He had an opportunity to be heard in the Ellerman suit. It was expressly for the benefit of all stockholders who might come in and contribute to its expense. He could, at any time before decree, have been made a party to the Ellerman suit, and have then advised the court of anything not before brought to its attention.

He had ample time to so apply after he actually knew of the pendency of the suit, and his solicitor was thoroughly informed of all proceedings in the Ellerman case in time to have intervened. Counsel admitted, upon the argument, that the question whether they should intervene in the Ellerman suit, or resort to an independent action, was considered and discussed before bringing the present suit was determined upon.

Besides, from the very form and nature of these suits, each stockholder must be considered as represented, for if he is in sympathy with the complainant he may become a party complainant by application to the court; if he is in sympathy with the threatened action of the company, he is represented by and in the corporation which is a necessary party to the suit. *March v. Eastern R. R. Co.*, 40 N. H. 548. Not only this, but the court may, if satisfied that the interests of the corporation are not being properly presented or protected, admit a stockholder to be made a party defendant. *Bronson et al. v. La Crosse & M. R. R. Co.*, 2 Wall. 283.

[The learned judge then held, that the charge that the Ellerman suit was collusive was not sustained; and said: "The Ellerman suit, not being collusive, must be held to be conclusive in this, upon all questions which were therein decided, . . ." He then proceeded to consider the matters which arise under the contract of Jan. 15, 1892, not passed on in the former suit, and which are the subject matter of the supplemental bill.]

*Bill and supplemental bill dismissed.*

VAN FLEET, V. C., concurred.

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## TOMKINSON v. SOUTH-EASTERN RAILWAY CO.

1887. L. R. 35 Chan. Div. 675.<sup>1</sup>

THIS was a motion by the Plaintiff, a holder of £500 deferred ordinary stock of the *South-Eastern Railway Company*, for an injunction to restrain the company and its directors, officers, servants, and agents, until the trial of the action or further order, from subscribing, advancing or paying, out of the moneys of the company, the sum of £1000, or any other sum, by way of donation, or otherwise, to or for the purposes of the *Imperial Institute*, or to any person or persons on behalf of the *Institute*.

At a meeting of the stockholders or "proprietors" of the *South-Eastern Railway*, held on the 5th of March, 1887, to consider a circular issued by the executive council of the *Imperial Institute* to the *South-Eastern* and other railway companies, inviting them to subscribe to the funds of the *Institute*, the following resolution was passed, on the motion of the chairman of the company: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised, to subscribe the sum of £1000 to the *Imperial Institute*: provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant."

<sup>1</sup> Part of opinion omitted. — ED.



The resolution was carried by 10,229 votes, representing £1,209,035 ordinary stock of the company, against 175 votes, representing stock to the amount of £13,500.

The Plaintiff was not himself present at the meeting, but, having read a report of the proceedings, he, on the 11th of March, wrote to the secretary of the company protesting against the proposed application of any of the company's funds towards the *Imperial Institute*, and threatening legal proceedings. In his reply the secretary pointed out that the directors were accustomed to act in obedience to the orders of their shareholders, and not otherwise, and that, having regard to the amount of the Plaintiff's holding, his interest in the contribution of £1000 would be represented by about 13*d*.

After some further correspondence the Plaintiff commenced this action, and now moved as above stated.

In an affidavit in opposition to the motion, the company's general manager stated that, in recommending the proprietors to contribute to the funds of the *Institute*, the directors desired to further its establishment in the belief that a great number of visitors would thereby be drawn from the districts served by their railway and their traffic largely increased; and that, inasmuch as the previous exhibitions at *South Kensington* had, by the issue of through tickets from their system of railways, increased the traffic revenue of the company by several thousands of pounds, the directors believed that the establishment of the *Institute* at *South Kensington* would lead to a similar result. The affidavit further stated that railway companies in general had been accustomed to contribute to the funds of objects likely to encourage traffic upon their lines, such as race-meetings and regattas, and also to hospitals and other public institutions which might benefit their employés.

*A. Young*, for the Plaintiff:—

The proposed subscription is clearly *ultrà vires*, it not being one of the objects for which the company was incorporated to promote or support popular exhibitions.

Sir *R. Webster*, *A. G.*, *C. T. Mitchell*, and *Worsley Taylor*, for the Defendants:—

It is not *ultrà vires* of a company to expend its funds for the advantage of its undertaking. A company has inherent power to do whatever may be conducive to its popularity or to the objects of its undertaking: *Taunton v. Royal Insurance Company*; <sup>1</sup> *Hampson v. Price's Patent Candle Company*; <sup>2</sup> *Hutton v. West Cork Railway Company*; <sup>3</sup> *Pickering v. Stephenson*. <sup>4</sup> As the company are not, we submit, acting *ultrà vires*, the Court will not interfere in their internal affairs: *Foss v. Harbottle*; <sup>5</sup> *Pickering v. Stephenson*. <sup>6</sup> Even

<sup>1</sup> 2 H. & M. 135.

<sup>2</sup> 23 Ch. D. 654.

<sup>3</sup> 2 Hare, 461.

<sup>4</sup> 45 L. J. (Ch.) 437.

<sup>5</sup> Law Rep. 14 Eq. 322.

<sup>6</sup> Law Rep. 14 Eq. 339.

if the proposed subscription is *ultra vires*, the damage to the Plaintiff is so infinitesimal that the case is not one for an injunction.

KAY, J. : —

I have no doubt that it is the duty of the Court to grant an injunction in this case.

The question, as the Attorney-General said, is whether the act proposed to be done is within the powers of the railway company, or outside its powers. If it is outside its powers, it is now perfectly settled that any one shareholder may come to this Court and say, "This company is going to do an act which is beyond its powers: stop it;" and the Court thereupon has no discretion in the matter.

Now, what is proposed to be done here is this: the chairman of the railway company, at a meeting of the company, proposed this resolution: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised" — the resolution thus proposing two alternative modes — "to subscribe the sum of £1000 to the *Imperial Institute*." I pause there. The *Imperial Institute* has no more connection with this railway company than the present exhibition of pictures at *Burlington House*, or the *Grosvenor Gallery*, or *Madame Tussaud's*, or any other institution in *London* that can be mentioned. The only ground for the suggestion that this company has the right to apply its funds, which it has been allowed to raise for specific purposes, to this purpose, is, that the *Imperial Institute*, if it succeeds, will very probably greatly increase the traffic of this company. If that is a good reason, then, as I pointed out during the argument, any possible kind of exhibition which, by being established in *London*, would probably increase the traffic of a railway company by inducing people to come up to see it, would be an object to which a railway company might subscribe part of its funds. I never heard of such a rule, and, as far as I understand the law, that clearly would not be a proper application of the moneys of a railway company. I cannot distinguish this case from that at all, though, of course, I do not mean to disparage the enormous importance of the *Imperial Institute*. It may be established for the highest possible objects of interest to this country; but still, the only reason given to me why this railway company thinks it right to spend part of its funds in subscribing to it is this, that it will probably greatly increase the traffic of the company by inducing many people to travel up to visit this *Institute*. I cannot accept that as a reason for a moment. Therefore, as at present advised, it seems to me that this is *ultra vires*.

Before I go further I will read the rest of the resolution: "Provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant." That means this: "We, the directors, propose to spend money which ought to be divided among you, the shareholders, in paying a subscription to this *Institute*: if you do not like it, we admit you have a right to object, and your proportion will be returned to you with your

next dividend warrant." This shareholder says, "I do not want my money spent in that way;" and he is right, if it is beyond the powers of the company, in saying that the money shall not be spent in that way. Moreover, his objection is not confined to his own share. It is said that his share of the subscription would be comparatively trivial; but, if the subscription is *ultra vires*, the company ought not to spend a farthing of their funds on the *Institute*. His objection is to the whole expenditure.

Now the cases which have been cited really seem to me to be authorities directly against this proposed application of the company's funds.

[The learned Judge then cited and commented on *Taunton v. Royal Ins. Co.*, 2 H. & M. 135; *Humpson v. Price's Patent Candle Co.*, 45 L. J. (Chan.) 437; and *Hutton v. West Cork R. Co.*, L. R. 23 Chan. Div. 654; and then continued as follows:]

I do not think I need refer particularly to *Pickering v. Stephenson*.<sup>1</sup> There what was done was decided to be *ultra vires*, but seeing that the amount which the plaintiff would be entitled to recover was exceedingly minute, the Court would not make an order for payment back to him of the moneys improperly expended.

Does any one of those cases touch the present? Certainly, I should be the last Judge on the bench to extend the meaning of those cases. It is absolutely necessary to keep incorporated or joint stock companies within the limits of their powers. That is a rule which has been recognised over and over again. To say that, because the authorities which have been referred to have held that the acts there done were within the limits of the powers of the company in each case, therefore it follows that any expenditure which may indirectly conduce to the benefit of the company is *intra vires*, seems to me extravagant.

I know of no authority whatever for saying that the payment of £1000 out of the funds of this company as a subscription to the *Imperial Institute* would be within the powers of a railway company. I might stop there, because, this being an application for an interlocutory injunction, I am bound, if I felt difficulty upon the question, to restrain the matter until the trial of the action; but my present opinion is entirely against the validity of this act.

Therefore, it seems to me I am clearly bound to restrain, until the trial of this action, the expenditure of this money out of the company's funds.

An alternative is suggested, as I pointed out, in the resolution inviting the individual proprietors to sanction this payment out of their funds, because it says "either by way of donation from the company or by an appeal to the proprietors, as they may be advised." An appeal to the proprietors means an appeal to subscribe £1000, which they are invited to give to the *Imperial Institute*. To that no kind of objection could be made; but this case has been argued on the footing

<sup>1</sup> Law Rep. 14 Eq. 322.

that the alternative adopted by the directors has been, not to take that step, but to apply the moneys of the company. That, it seems to me, the Court is bound to restrain them from doing, and I therefore grant an injunction in the terms of the notice of motion, the Plaintiff giving the usual undertaking in damages.

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FORREST v. MANCHESTER, &c. RAILWAY CO.

1861. 4 *De Gex, Fisher & Jones*, 125.<sup>1</sup>

THIS was the appeal of the plaintiff from the dismissal of his bill by the Master of the Rolls. The plaintiff was a shareholder in the Manchester &c. Railway Co.; and sued, on behalf of himself and the other shareholders of the company, for an injunction to restrain the defendants from conveying in vessels or boats passengers, cattle, or goods from Hull or Grimsby to Spurn Point.

The bill alleged that the traffic sought to be restrained was beyond the powers of the company under their Act, and was also prejudicial to another company called The "Gainsborough United Steam Packet Company, Limited," in which the plaintiff was a large shareholder.

The answer stated, *inter alia*, that the suit was not for the benefit of the other shareholders of the company on whose behalf the plaintiff held himself out as suing, but was instituted solely to promote and serve the interests of the Gainsborough United Steam Packet Company Limited, and that all the other shareholders of the defendants' company were opposed to the suit.

Evidence was gone into, and the plaintiff on his cross-examination admitted, that he held only 82% stock in the railway company, but was the holder of twelve 30% shares in the packet company, which was paying a dividend of 10% per cent; and that the excursion traffic had been continued for eight or ten years. He also admitted that the directors of the packet company had directed the institution of the suit, and indemnified him against costs. The Master of the Rolls dismissed the bill on the ground that the Act sought to be restrained was not *ultra vires*.

*Selwyn*, and *E. K. Karlake*, for appellant. [Citations omitted.]

*The Solicitor General (Sir R. Palmer)* and *Fischer*, for respondents, were not called upon.

THE LORD CHANCELLOR [WESTBURY]. In this case I am asked to reverse the order of the Master of the Rolls dismissing this bill with costs. I desire it to be distinctly understood that my decision does not proceed upon the grounds stated by the Master of the Rolls. It is

<sup>1</sup> Statement abridged. — Ed.

unnecessary for me to express any opinion upon the grounds stated by his Honor which, if they are correct, would be confined entirely to this particular case, because they have reference to the peculiar constitution of the present company. But the ground upon which I proceed is entirely that of personal exception to the character of the plaintiff, and the foundation of my decision is contained in this passage of the plaintiff's own examination not attempted to be qualified or questioned. He says in that examination "The directors of the packet company directed the institution of this suit and indemnify me against costs." It is not that they persuaded him to institute the suit, not that they instigated the suit, but that the directors of the other company have "directed the suit," and are to indemnify the plaintiff against the costs of it. To use a familiar expression, the plaintiff is the puppet of that company. It has been a very wholesome doctrine of this Court that one shareholder having in view the legitimate purposes of the company may be permitted in this Court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted indisputably requires that the suit shall be a *bonâ fide* one, faithfully, truthfully, sincerely directed to the benefit and the interests of those shareholders whom the plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a Court of Equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding.

It is, however, said that this objection was considered some years ago in the well-known case of *Colman v. The Eastern Counties Railway Company*,<sup>1</sup> and was overruled by the late Master of the Rolls, Lord LANGDALE. All I mean to say about that case is that the objection there proceeded upon a different ground. The proposition of Lord LANGDALE is that it is no ground of personal exception to a plaintiff that he has been instigated to institute his suit by another company. If the proposition be limited to the extent of the words in which it is expressed, possibly there may be no exception to that proposition, but undoubtedly I would not assent to it if carried one jot beyond those

<sup>1</sup> 10 Beav. 1.

limits. I desire, however, to point out again the wide difference which exists between a suit "directed" to be instituted by the directors of another company, and a suit which is *bonâ fide* instituted by the plaintiff, persuaded only to the institution of it by the arguments of another company. In the one case the suit is the suit of the plaintiff, and is for ought that appears instituted at the peril of the plaintiff. In the other case, the whole origin of the suit and the direction and conduct of it emanate altogether from the other company, and the suit would have no existence whatever but for the order of the other company. I consider, therefore, that the language in which the Master of the Rolls expresses himself upon the proposition then submitted to him does not in the smallest degree interfere with or weaken the ground that I have taken.

I have nothing to do with the motives of plaintiffs suing in this Court. If they come here in a *bonâ fide* character, the reason for their coming here is a matter beyond the province of a Court of Justice to inquire into.<sup>1</sup> But if a man comes here representing to me that he is a *bonâ fide* shareholder in a company, and that it is the *bonâ fide* suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that this is an illusory proceeding, and ought not to be attended to by the Court. The well-known words, — the trite quotation, — will occur to the minds of those who hear me. "Fabula non est judicium in scenâ non in foro res agitur." If this gentleman be permitted to come and assume merely for the purpose of coming into this Court the garb of a shareholder, but at the same time explicitly announces, "This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act: I am directed to do it by another party, and another body of men," then in point of fact the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court.

I treat this suit as an imposition on the Court. By these words I mean no reflection upon the plaintiff himself, because he has told the truth, and does not appear at any time to have desired to conceal it. But as he comes here in the character of a shareholder in the company, and tells me frankly that the institution of the suit is not his own act, but an act that he has been directed to do by the other company, then, using the words without offence, I denominate that suit an imposition on the Court, and I dismiss it accordingly, and affirm, though on a different ground, the order that has been made.

I refuse this application with costs.

<sup>1</sup> See Kerr Inj. 549.

## SEATON v. GRANT.

1867. *L. R. 2 Chan. Ap.* 459.<sup>1</sup>

This was an appeal from an order made on the 12th of February, 1867, by Vice-Chancellor *Malins*, refusing an application of the Defendants that the bill might be taken off the file, or that all further proceedings might be stayed.

The bill was filed by *Charles Seaton*, on behalf of himself and all other shareholders in the *Credit Foncier and Mobilier of England, Limited*, except the Defendant, *Albert Grant*, against *Albert Grant*, *George Edward Seymour*, and the above-named company, under the following circumstances:—

The Defendant, *Albert Grant*, was the managing director of the above-named company. The Defendant, *George Edward Seymour*, was the chairman of a company called the *City of Milan Improvements Company*. The Plaintiff alleged that the two last-named Defendants had, in the year 1865, formed what is called a “syndicate” on the *Stock Exchange*; that is, a combination for the purpose of raising the value of the shares of the *Milan Company* to a fictitious premium; and that, with this end, *Grant* had purchased 12,129 shares in the *Milan Company*, and paid for them out of the funds of the *Credit Foncier*, by which the latter company had sustained a great loss, the shares of the *Milan Company* having fallen very much in value.

He also alleged that the Defendants were taking measures to re-constitute the *Credit Foncier*, by dissolving the company, and transferring its assets and liabilities to a new company.

The bill prayed that the Defendants, *Grant* and *Seymour*, might repay to the *Credit Foncier* the money expended in the purchase of the shares in the *Milan Company*, and that the *Credit Foncier* might be restrained from handing over their assets to any other company, until all their debts and liabilities had been paid and satisfied.

The bill was filed on the 19th of July, 1866, and immediately afterwards the Plaintiff moved for an injunction, in terms of the prayer, before Vice-Chancellor *Kindersley*, who refused the motion with costs.

On the occasion of the motion, the Plaintiff was cross-examined in Court, when it appeared that he held only five shares of £20 each in the *Credit Foncier*, which he acquired solely for the purpose of filing this bill; and that his reason for filing the bill was that he and several of his friends had lost money by speculating in shares of the *Credit Foncier*, and that he was advised that if he bought shares, and then filed a bill to impeach certain transactions of which he had notice, he would probably be bought off at a high price, and so obtain compensation.

<sup>1</sup> Portions of argument, and of opinions, omitted. — Ed.

Subsequently to the filing of the bill, two extraordinary meetings of the *Credit Foncier* were held on the 30th of July and the 15th of August, 1866, at which resolutions were passed for winding up the company voluntarily, and for the formation of a new company, for objects which would include the carrying on of the business of the *Credit Foncier*.

The Defendants put in answers to the bill, but refused to give full information to the Plaintiff as to the transactions complained of; and their answers were excepted to by the Plaintiff.

The motion now under appeal was made by the Defendants *Grant* and the *Credit Foncier*, and, having been refused by the Vice-Chancellor, was now renewed before the Lords Justices.

The *Attorney-General* (Sir *John Rolt*), Mr. *Karlake*, Q.C., and Mr. *Waller*, for the company; and

Sir *Roundell Palmer*, Q.C., Mr. *Bailey*, Q.C., and Mr. *Speed*, for the Defendant *Grant*:—

We say, first, that this suit is not *bonâ fide*. The Plaintiff had no shares in the company while the bill was being prepared; he bought five shares just before it was filed, and can give no reason for his proceedings, but that he had lost money by speculating in the shares of the company, and wanted to make the company repay him these losses. The Court will not entertain such a bill: *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company*.<sup>1</sup> That case decided that the Plaintiff must have a legitimate interest in the subject matter of the suit. The interest of the Plaintiff is merely nominal. If his whole claim is recovered, and divided among the shareholders, his share would be about 40s. Such a bill is an abuse of the process of the Court, and partakes of the nature of maintenance: *Filder v. London, Brighton, and South Coast Railway Company*; <sup>2</sup> *Foxwell v. Webster*.<sup>3</sup>

[Remainder of argument omitted.]

Mr. *Wickens*, for defendant Seymour.

Mr. *Glasse*, Q.C., and Mr. *Cracknall*, for plaintiff, were not called on.

[The opinion of SIR G. J. TURNER, L. J., is omitted.]

LORD CAIRNS, L. J. This motion is one of a very novel, but of a very important character, because it asks the Court to shut the door in the face of the Plaintiff, not on the merits of the case, but on the ground that he has by his conduct disentitled himself to institute the suit. The theory of the law of this country is, that every subject has a right to bring his complaint to a hearing, if it be not capable of being stopped by a demurrer or a plea. The exceptions which have been established to this rule merely shew the strength of the general rule. Those exceptions are four in number:—First, where the Plaintiff is required to give security for costs. That is hardly an exception, because the Court only stays the proceedings in the suit until the

<sup>1</sup> 9 W. R. 818.

<sup>2</sup> 1 H. & M. 489.

<sup>3</sup> 12 W. R. 94, 186.



security is given. Second, where the Defendant is willing to give to the Plaintiff all the relief which he asks, and to pay his costs of the suit. Third, where the subject matter of the litigation has perished, or has been removed, and nothing remains to be decided but the payment of costs of the suit. There the Court considers that it would be useless to allow the suit to go on to a hearing when the only question to be determined can be as well decided upon motion. Fourth, where the bill has been filed without the authority of the person who appears as the Plaintiff, or where the name of a corporation has been used without a sufficient title to use it. In such a case the bill is treated as a fraud upon the Court, and is therefore ordered to be taken off the file.

The grounds alleged for the present motion are three:—First, a personal exception to the Plaintiff. I do not think that I unfairly represent the conclusion which the parties desire to draw from the cross-examination of the Plaintiff if I put it in this way. The Plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill, in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this Court, or, indeed, in any other Court, and such conduct might be material at the hearing with reference to the amount of relief which the Plaintiff could obtain, or whether he was entitled to any relief at all. But the question is, whether these facts are necessarily fatal to the Plaintiff's claim to relief? Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to say at this stage of the suit that the Plaintiff's conduct would altogether disentitle him to relief. The case of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway*,<sup>1</sup> which was relied upon in the argument, is distinguishable from the present case upon two grounds: first, because that was the hearing of the cause; and, secondly (and this is the main distinction), because there the Court came to the conclusion that the Plaintiff was simply a puppet in the hands of another company, and that he was indemnified by that company against the costs of the suit. That objection amounted to this, that a suit professing to be the suit of Company *A.*, was really the suit of Company *B.*

The second ground relied on in support of this motion was, that the Plaintiff's *quantum* of interest in the suit was very insignificant. But if we should hold that the suit can be maintained in other respects, I think that the aggregate interest of all the shareholders in the subject matter of the suit is amply sufficient to sustain the suit.

[Remainder of opinion omitted.]

*Motion refused with costs.*

## WINSOR v. BAILEY.

1875. 55 *New Hampshire*, 218.<sup>1</sup>

BILL in equity by Winsor *et als.* against the Hooksett M'fg Co., and various individuals; alleging that certain monies of the company have been wrongfully paid over to some of the defendants; and praying that the recipients may be decreed to repay the same to the corporation. The bill alleges that the plaintiffs are owners of stock in the company, and sets out specifically the number of shares owned by each; but does not allege that they were owners of stock at the time of the payments complained of. Defendants demurred.

*Mugridge*, for plaintiffs.

*Fowler and Tappan*, for defendants.

LADD, J.

2. The bill alleges that the plaintiffs are owners of stock, and sets out specifically the amount owned by each. It is contended for the defendants that the bill is defective in not showing that they were owners of stock at the time of the alleged wrongful payment to some or all of the defendants. No authority is referred to in support of this position, and I see no sound reason upon which it can be sustained. To hold so, would seem to involve the singular consequence that the transfer of stock in a corporation extinguishes the right to inquire into the previous fraudulent conduct of its officers, whereby its funds have been misappropriated.

CUSHING, C. J., concurred.

SMITH, J. 2. The plaintiffs allege that they are stockholders in the Hooksett Manufacturing Company, and specify the number of shares owned by each, but do not allege that they were stockholders at the time the dividend was paid the defendants. But that is not necessary, and it is immaterial whether they were or not. The transfer of the stock conveyed to them not only the ownership of the shares and the right to the future dividends thereon, but also placed them on an equal footing with the other stockholders in respect to the right to call the officers and agents of the corporation to an account for their fraudulent conduct.

<sup>1</sup> Only so much of the case is given as relates to one point. — ED.

## PARSONS v. JOSEPH.

1890. 92 *Alabama*, 403.<sup>1</sup>

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 19th day of July, 1890, by Henry Joseph, as a stockholder in the Birmingham, Powderly & Bessemer Street Railroad Company, against the said corporation and J. H. Parsons; and sought the cancellation of certain certificates of stock issued by the corporation to said Parsons, on the ground that the stock was fictitious and fraudulent. There was a demurrer to the bill, and a motion to dissolve the injunction, each of which was overruled; and this appeal is sued out by the defendants from that interlocutory decree.

*Lea & Greene*, for appellants.*White & Howze*, *contra*.

COLEMAN, J. The purpose of the bill is to have certain certificates of stock issued by the Birmingham, Powderly & Bessemer Street Railroad Co. to defendant Parsons, cancelled, on the ground that the stock is fictitious, and was issued in violation of the Constitution and statute law of the State. The bill prayed an injunction, and the writ was awarded by the chancellor. A demurrer was interposed, and also an answer by the defendant Parsons. The cause was submitted for decree on the demurrer, and upon motion to dissolve the injunction. The court overruled the demurrer, and denied the motion to dissolve the injunction, and from this interlocutory decree the appeal is taken.

Among other averments, the bill substantially alleges that plaintiff is a *bona fide* stockholder in said company; that shortly after the organization of the company, the defendant subscribed for one hundred and seven shares of the capital stock of the company, of the par value of fifty dollars each, and paid for the same in full by conveying to the company thirty-nine acres of land (describing the land) at an agreed price and valuation of one hundred and thirty-seven dollars per acre, when the land was not worth more than twenty-five dollars per acre, and for this land Parsons was to receive one hundred and seven shares of the stock; that shortly thereafter, the capital stock of the company was doubled, and without further consideration than the thirty-nine acres of land, Parsons' stock was doubled, and he received two hundred and fourteen shares of the capital stock. The bill, as amended, charges the excessive valuation of the land was made knowingly, wilfully, and with the fraudulent intent of having issued to Parsons the fictitious stock, in violation of law. This is a sufficient statement of the facts for the consideration of the demurrer.

<sup>1</sup> Arguments omitted. — ED.

The demurrer admits the truth of the averments. It is contended, that the bill is defective in not averring that plaintiff was a stockholder at the time of the transaction, complained of as being fraudulent, or that his stock devolved upon him by operation of law.

In the case of *Dimpfell v. Ohio & Miss. R. R. Co.*, 110 U. S. p. 209, relied upon by appellant, it was held, that a stockholder, contesting as *ultra vires* an act of the directors, should aver "that he was a stockholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law." To the same effect was *Hawes v. Oakland*, 104 U. S. 450; and many others might be cited. Upon an examination of these authorities, it will be seen that the principle asserted rests solely upon equity Rule No. 94 adopted by the United States Supreme Court and which may be found in the preface to vol. 104 of U. S. Reports. Morawetz on Private Corporations, speaking of this rule, says, it was evidently designed as a rule of practice merely, and was deemed necessary to guard courts from being imposed upon by collusion of parties. — Morawetz on Priv. Corp., §§ 269, 270. The rule is not a general principle of law, applicable to pleadings in all the courts, and has never been applied to the courts of this State. The demurrer to the bill for failing to make this averment was properly overruled.

The motion to dissolve the injunction was heard upon the sworn bill and answer. The answer denied that plaintiff was a *bona fide* stockholder, and set up that plaintiff was the transferee of one E. Lesser. The answer admits that defendant's stock was doubled without the payment of any additional consideration than that of the land; but by way of explanation and defense, avers that the lands were not truly and properly valued at first, and the increased valuation of the lands only raised them to their real and true value, and the additional issue of stock was for property at its fair valuation. The answer continues, however, as follows: that if said transaction had been illegal and fraudulent, and not done in good faith, complainant is estopped from setting up fraud in said transaction, or seeking to cancel said stock, because E. Lesser, who was complainant's transferrer, participated in all of said transactions and himself fixed the value of said lands, with full knowledge of and after full investigation of the value of said land.

A transferee of stock is not necessarily disqualified as a suitor in all cases, because the prior holders were personally disqualified. If the transferee purchased the shares in good faith, and without notice of the fact that the prior holder had precluded himself from suing, he would have as just a title to relief, as if he had purchased from a shareholder who was under no disability; but, if the purchaser was aware that the prior holder had barred his right to relief, neither justice nor public policy would require that the transferee, under these circumstances, should be accorded any greater rights than his transferrer. — Morawetz, *supra*, § 267.

The same rule prevails in this State in favor of derivative purchasers.

If a claimant was a *bona fide* purchaser, without notice of a fraud, or of facts which the law considers sufficient to establish it, or from which it is inferable, then he could not be affected by notice to his vendor. — *Horton v. Smith*, 8 Ala. 78; *Fenno v. Sayre*, 3 Ala. 458; *Weer v. Davis*, 4 Ala. 442; *Martinez v. Lindsey*, 91 Ala. 334; Wait on Insol. Cor., §§ 628, 630.

If a stockholder participates in a wrongful or fraudulent contract, or silently acquiesces until the contract becomes executed, he can not then come into a court of equity, to cancel the contract, and more especially, if the company, or himself, as a stockholder, has reaped a benefit from the contract; and this rule holds good, although the consideration of the contract may be one expressly prohibited by statute. The same disability would attach to the transferee of his stock who bought with notice. We consider this general rule of equity abundantly sustained. — Morawetz on Priv. Corp., §§ 261, 262; Cook on Stock and Stockholders, §§ 39, 40, 735; *Wright v. Hughes*, 12 Amer. St. Rep. 413. It is sustained by the familiar rule, that he who invokes the aid of a court of equity must have clean hands. Mr. Cook states the conditions upon which a stockholder can sustain a suit to remedy the frauds, *ultra vires* acts or negligence of directors, to be, *first*, the acts complained of must be such as to amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone; *second*, that the complaining stockholder himself is free from *laches*, acquiescence of the acts to remedy which the suit is brought; *third*, that the corporation has been requested and refused or neglected to institute the suit, that the suit is instituted by *bona fide* stockholders as complainants, and that the corporation and the guilty parties, and other proper parties have been made defendants. Cook, *supra*, § 646.

If the averments of the bill are sustained by proof, the stock issued to the defendants was in violation of section 1662 of the Code and of section 6, Article XIV of the Constitution. On the contrary, if the proof shows that the property was received in payment of stock, at a fair valuation, such would not be the result. — *Davis Bros. v. Montgomery Fur. & Chem. Co.*, at present term.

In cases where the stockholders of the company by any *laches*, acquiescence, or participation in the unlawful and fictitious issue of stock or for any other sufficient cause are precluded from instituting the proper proceedings, to remedy the wrong, the remedy is still open to the State to institute all necessary and proper proceedings to vacate and dissolve the corporation, or have such other proper judgment and decree rendered, as the proof and justice may demand.

It may be, that stockholders, who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation, are liable as stockholders who have not paid up in full for their stock, within the meaning of the statute, to creditors who have not precluded themselves from maintaining the suit. — Wait, *supra*, § 593; *Douglas v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93.

Applying the rule of law applicable when a motion to dissolve an injunction is submitted upon bill, exhibits, and answer, and considering only so much of the answer as is responsive to the bill, we are of opinion that the decretal order, overruling the demurrers and motion to dissolve the injunction, is free from error.

Affirmed.

The case of *Downey v. Joseph* was affirmed on the authority of the above case.

## PARSONS v. HAYES.

1883. 14 *Abbott's New Cases* (N. Y.), 419.<sup>1</sup>

PLAINTIFF sues on behalf of himself and all other shareholders in the Varhuff Mining, &c. Co., a corporation formed under the laws of New York. The defendants are the corporation, and various individuals who are officers of the same. The complaint alleged, *inter alia*, that the corporation was under a disability to sue, by reason of being controlled by its directors, who were guilty of malfeasance in office. The other averments are stated in the opinion.

The original complaint was demurred to. The demurrer was overruled, but plaintiff amended the complaint. Defendants answered. Plaintiff demurred to certain matters set up as defenses. Certain of plaintiff's demurrers were overruled, and others were sustained. Plaintiff appealed to the General Term of the Superior Court, from the order overruling his demurrers to certain defenses set out in the answer.

*Grove M. Harwood* and *John B. O'Donnell*, for appellant.

[Omitting part of argument.]

III. The corporation could sue, as it is a distinct person from its shareholders (Pollock on Contr., 81, 82; Lindley on Partn. 4, 5; Dicey on Parties, 163). The members are but agents of the corporation and the corporation may sue its members (*Society v. Abbott*, 2 Beav. 559).

IV. The corporation holds the property and assets as a trustee for the members (*Hotel Co. v. Wade*, 97 U. S. 13), and if the corporation will not sue, the members can (*Butts v. Wood*, 37 N. Y. 317; *Greaves v. Gouge*, 69 N. Y. 154).

*Robert L. Fowler* and *Victor Morawetz*, for various defendants.

[Omitting part of argument.]

II. This is not an action for a wrong to the plaintiff. If the defendants had deceived the plaintiff, or caused him any injury directly, he would be entitled to recover the amount of damages he had suffered in

<sup>1</sup> The case, as here given, is made up partly from the report in 14 *Abbott*, and partly from the report in 50 *New York Superior Court*, 29. The statement is rewritten, and portions of the argument are omitted. — Ed.

an action of a legal nature. No such claim is made. The complaint is framed as a proceeding on behalf of the corporation for a wrong against the corporation. Plaintiff alleges that the stock which he purchased was issued as paid up stock, and represented to the world as paid up stock by the board of directors. But he does not state that he was deceived by this representation, or that it caused him any injury. The form of the complaint is that of the ordinary stockholders' bill known in chancery practice. It is fundamental that a suit of this character cannot be maintained by a stockholder, unless the corporation itself would be entitled to recover in an action for the wrongs complained of. The complaint does not show that the corporation ever had a cause of action against the individual defendants. It was deprived of nothing of value by the issue of its shares. Shares of stock are merely the proportionate interests of the holders in the whole corporate concern, and their value depends upon the real capital which the company owns. The whole and the sum of its parts must be equal. In the present case the purchaser took back what he gave in another form. The corporation was not really in existence until the shares had been issued, although the statute provides that it shall be deemed in existence for certain purposes from the filing of the certificate of incorporation. The existence of a corporation before its shares have been issued is a fiction. The corporation could not be injured by the act which brought it into being.

IV. If a subsequent *bona fide* purchaser was deceived by the unauthorized and untrue certificates issued by the directors, he would have his remedy for damages. Creditors also would be entitled to redress to the extent of their claims. But the corporation as a body could not complain.

V. The law recognizes the fact that a corporation and the whole number of its stockholders are identical, — that the one represents and is made up of the other. It is upon this ground alone that the plaintiff has any standing in this court. A corporation cannot complain even on account of a breach of trust, or a direct misapplication of the corporate funds by the directors, after the acts complained of have been acquiesced in and ratified by the whole body of shareholders. If the corporation itself cannot complain under these circumstances, it is plain that a stockholder cannot complain on its behalf (*Hotel Co. v. Wade*, 97 U. S. 13; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 184; *Scott v. Depeyster*, 1 Edw. Ch. 513, 536; *Watt's Appeal*, 78 Pa. St. 370; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Kitchen v. St. Louis, &c. Ry. Co.*, 69 Mo. 224, 264; *Samuel v. Holladay*, 1 Woolh. 400; *Zabriskie v. Hackensack, &c. R. R. Co.*, 18 N. J. Eq. 178, 194; *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43; *Ffooks v. Southwestern Ry. Co.*, 1 Sm. & G. 142, 164; *Graham v. Birkenhead, &c. Ry. Co.*, 2 McM. & G. 146).

VII. There is a distinction between a suit by a shareholder for relief on account of a wrong committed before he purchased his shares, and a suit brought to restrain the performance of an unauthorized and void contract, which had been previously entered into.

SEDGWICK C. J. [After deciding that, upon this appeal, it is proper to examine the complaint to see if it contains any cause of action.] The learned counsel for the appellant states the claim of the complaint as follows. The plaintiff sues on behalf of himself and all other stockholders of the corporation defendant, alleging that the individual defendants, then being trustees of the said corporation, immediately after the organization thereof, by agreement with one Catlow, issued to him the whole capital stock of said corporation, viz. \$2,000,000, in exchange for property worth not to exceed \$150,000. That 90,000 shares of the stock were turned over to the defendant Hayes and his associates, and 20,000 shares to the defendant corporation by said Catlow, without payment therefor, in pursuance of the real agreement between the parties for the purchase of property and the issue of stock. That the individual defendants knew, or could have known, the value of the property, and that a portion of the stock was to be turned over as stated. That the defendants, trustees, represented the stock as full paid, and that the stock has been sold as full paid to innocent purchasers, including the plaintiff. That the plaintiff purchased his stock regularly in the open market, relying upon such representations, and received regular certificates, and that the stock was regularly transferred to him on the books of the corporation. That the individual defendants have received large gains and profits from the sale of that portion of the stock turned over to them. That the individual defendants have sold the stock turned over to the defendant corporation, or a large portion of it, at \$1 per share. That the individual defendants have not accounted for the difference between the value of the stock and the amount of property received (except as to the \$1 a share received from the treasury stock), nor for the gains and profits received by them from the sale of the stock turned over to them. That the corporation defendant is still under the control of the individual defendants.

The defendants among other defenses pleaded that plaintiff purchased his stock, knowing the facts attending the transaction set out in the complaint.

By the terms of the complaint the plaintiff sues for himself and "all other stockholders of the defendant company who may choose to come in and avail themselves of the benefit of the actions." The plaintiff is excused from naming all of these stockholders, on account of the inconvenience of making a great number of persons parties; but in legal contemplation, all of them are parties plaintiff, and all of them are in like case with the plaintiff named. These persons are stockholders, as it is called, having become so by transfer of shares from Catlow remotely or directly, and Catlow himself, if he have not trans-



ferred all his stock; unless as to Catlow, he is not to be deemed a party because he is not in like case with the plaintiff.

It will be convenient first to inquire, if Catlow as a plaintiff could have maintained such an action. The facts would have been, that previous to the impeached issue of certificates of shares, the corporation would have been in existence by virtue of the statute which declares (*Laws* 1848 c. 40, § 2, 3 *Edm.* 733) that when the certificate shall have been filed, the persons who shall have signed and acknowledged the same and their successors shall be a body politic and corporate in fact and in name, by the name stated in such certificate and by that name have succession and shall be capable of suing and being sued and they and their successors may have a common seal and they shall by their corporate name, be capable in law of purchasing, etc., property.

There was no stock or capital and there could be none excepting by third persons paying money or property for certificates of shares of the capital issued to them. There were then, of course, no shareholders. Catlow and the trustees of the corporation, who, by the statute were the corporation, made an agreement that was carried out, that certificates should be issued to him by the trustees which should represent that he was the owner of the whole number of shares of the capital stock, or two hundred thousand shares of the stock which by the certificate of incorporation was to be \$2,000,000, and he should convey to the company mining claims and property, which in fact had no greater value than \$150,000, as the parties to the transaction knew. In substance Catlow subscribed for the whole of the shares, agreeing to pay therefor, only property of the value named.

The statute declared that only money should be taken by the trustees to the nominal amount of the shares issued, or property, the actual value of which was equal, to that nominal amount. The agreement was unlawful and its execution could not have been enforced by either party to it. It was in fact made and executed to evade the statute.

It was a part of the agreement that upon the certificates being issued to Catlow he should transfer to each of the trustees certain shares. The trustees received these shares from Catlow and afterwards sold them for large sums of money for their own benefit. Upon the certificates being issued to Catlow he would become a shareholder. At least it is necessary to suppose, that although the transaction was forbidden by law, yet it was in fact done, and by it, Catlow became a shareholder. Upon the supposition that Catlow, being the owner of all the shares excepting such as he had transferred to the trustees, brought his action, he would claim that he had a right to demand that the company should bring an action against the trustees to compel them to pay the company money sufficient with the value of the mining property to amount to \$2,000,000 which was by the certificate to be the capital, and also pay to the company the amounts of money for which they had sold the shares he had transferred to them.

As the action would be by him declared to be for his benefit, it

would ordinarily be necessary to say no more, than that he was not entitled to be benefited, through claiming an interest in what may be called damages for an act in which he had taken part, indeed which he had promoted. But certain positions have been taken for the present plaintiff, which would apply to Catlow and those may be now examined.

It is said for the present plaintiff that the transaction was unlawful and invalid, and cannot be made lawful or be validated. If that be so, it would be true in the case of Catlow. It is nevertheless also true, that there is nothing unlawful or invalid, in the parties to an unlawful arrangement, being without a right to share in damages (to use a convenient word) which have flowed from the unlawful act.

There is at this point a distinction taken for the plaintiff, between the right of the corporation to damages and the right of a party consenting to the wrong, being entitled to damages. It is said that a corporation is an artificial person, a legal entity entirely different and distinct from the persons of which it is composed and the corporation as a distinct person may be injured by one or all of its members, and in either case has a right of action. Without stopping to ascertain the real meaning of this definition of a corporation, and assuming the other proposition to be correct, it is further to be ascertained if the corporation has been injured in the transaction or has suffered damage.

The injury or damage in one direction would be the consequence of issuing certificates by an invalid act that on the assumption of the plaintiff's argument is incapable of ratification. If this be a void act, then it would be necessary to say, that the certificates issued were void and the corporation could proceed to issue certificates of shares in a legal manner. But such a view would disclose that Catlow or the plaintiff would not be a shareholder and therefore not entitled to bring such an action as the present.

Such an injury, of course, is not claimed, but it is claimed that the injury was the trustees issuing for property of small value certificates to the nominal amount of \$2,000,000, whereas it was the duty of the trustees not to issue them except for \$2,000,000. The complaint does not allege nor can it be presumed that if the certificates had been properly dealt with, any more could have been procured for them, than was in fact, and therefore it does not appear that any pecuniary damage was suffered. Or, in other words, it does not appear that if the trustees had performed their duty, of not issuing except for equivalent value, that the corporation would have had more capital than now.

Excepting these considerations it may be supposed that there was damage to the company from the trustees' acts. Was there any injury under the facts? It is true, that the corporation is something more than its trustees and shareholders; but its property, chattels, money or choses in action, it owns not in its own interest but for the pecuniary benefit of the natural persons connected with it. It would be impossible to look upon the property rights of a corporation merely having regard

to its being an ideal creature. It acts through natural persons. It acts for the benefit of natural persons. In truth natural persons compose it. The statute under which it was formed says this. The trustees who are trustees under the statute for the corporation are the trustees for the shareholders. In *Karnes v. Rochester & Genesee Valley R. R.* (4 *Abb. Pr. N. S.* 107), the court said, "The directors stand in the relation of trustees to stockholders and between them exists the relation of trustee and *cestui que trust*." As for this *Butts v. Wood* (38 *B.* 181, afterwards affirmed, 37 *N. Y.* 317), was quoted, it must have been said upon an identification of the stockholders and the corporation. The same case said (p. 110), "The corporation does not stand in any fiduciary relation to its stockholders. Such a relation between the corporation and its corporators, is shown in a well considered opinion by Vice-Chancellor McCoun, in *Verplanck v. Mercantile Ins. Co.* (1 *Edw. Ch.* 87), to be impossible. The stockholders are in no sense creditors of the corporation, nor are they in the situation of partners. They are constituent parts of the corporation." The language of Vice-Chancellor McCoun, in *Verplanck v. Mercantile Ins. Co.* (1 *Edw. Ch.* 87) was, "The corporation is merely the creature of the law, a political body, not a natural body, made up of the compact entered into by the stockholders, each of whom becomes a corporator identified with and forming a constituent part of the corporate body, and therefore when we speak of stockholders and the incorporated company of which they are the components, we refer to one and the same collection of persons. How then, can the relation of trustees and *cestui que trust* exist, for such a relation requires separate and distinct persons or separate and distinct bodies to constitute it." This case afterwards affirms that the directors are the agents and trustees of the corporation or stockholders.

In *Railway Company v. Allenton* (18 *Wall.* 234), the charter declared that all the corporate powers of the corporations shall be vested in and exercised by a board of directors, etc., and it also declared that the capital stock of the corporation may be increased from time to time at the pleasure of said corporation. The court held that the capital could not be increased by the directors without the consent of the shareholders. The opinion said that a corporation like a partnership is an association of natural persons, and that fundamental changes of corporate purposes cannot be made without the express or implied consent of the members.

Again, considering that the fundamental position, is that Catlow became in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties. The corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property in fact, owning all of it, excepting the legal title, which as against them could be used for corporate purposes. The trustees were the statutory corporation.

The shareholders were members or a part of the corporation. The corporation held the legal title, for the pecuniary benefit of the shareholders, having no beneficial or pecuniary benefit in it.

On the claim for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees, for damages for their acts which it is claimed were wrongful to the corporation. This right was, if it existed, held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident, that the corporation could not claim as damage to its interest what would be damage to the beneficial interest where the owners of the latter had consented to the so called injury.

In fact, however, the case is a little different in point of circumstance, although not essentially. The beneficial owner or shareholder having in advance of the occurrence, which but for their participation would have created a cause of action in the corporation, promoted it and then participated in it, the conduct of the trustees never made a cause of action, because that conduct was not wrongful as respects the shareholder.

The principles that have now been used are established by *Scott v. De Peyster* (1 *Elhc. Ch.* 513); *Hotel Co. v. Wade* (97 *U. S.* 13); *Kent v. Quicksilver Mining Co.* (78 *N. Y.* 159). It is not necessary to give the reasoning of these cases. They are applicable here. It is supposed that in the last case there is a difference, in that acquiescence of shareholders was held to estop them in favor of innocent third parties. But it must be considered that after the power to ratify or acquiesce is held to exist, the same principle would act in favor of third parties although not innocent, against whom damages for the act ratified were claimed.

It seems to be clear that Catlow could not maintain an action like this, first because he could not claim that the corporation should bring an action for his benefit on account of a transaction which he took part in, and second because the corporation would have no cause of action or right to damages.

If the second proposition be true, then it necessarily follows there never having been any cause of action, or the right to damages having never accrued the claim cannot be revived in the future in favor of any person whether or not a transferee of shares from Catlow.

The plaintiff, however, because he claims through a transfer from Catlow cannot bring an action which Catlow could not have brought upon this case.

In *Mann v. Currie* (2 *B.* 298), the court said of the defendant that "if he became a stockholder by transfer to him of the stock of an original subscriber, he at once adopted his contract with the company and became substituted in his place, both as regards his rights and liabilities." This was said in relation to the obligations of the defendant to fulfil the terms of the original subscription of his assignor.

The reasoning that tends to the application of this conclusion in this case is just and seems to be clear. The shares which the plaintiff holds came to him through a certificate which was issued upon a particular arrangement under which the plaintiff claims, necessarily admitting it to have been effective. One feature of that arrangement was that the certificate should be issued to Catlow as his property for a consideration which the plaintiff claims was injurious to the corporation. As the plaintiff claims that the consideration although unlawful was sufficient to give a title which he maintains, he must abide by it as a fact and therefore in all its consequences. It is not competent for him to take part and reject part as it was one transaction. Counsel for the defendant in a later case before the general term cited on this point: *Hooker v. London Railway Co.* (7 *Ins.* 368); the opinions in *Williams v. Telegraph Co.* (48 *Super. Ct.* 349); *Mech. Bank v. N. Y. & N. H. R. Co.* (13 *N. Y.* 599); *Hughes v. Copper Co.* (72 *N. Y.* 207).

The claim that the corporation had a right to recover the amounts of profits made by the trustees for themselves individually in a transaction which they were conducting for the corporation has not yet been noticed. What has been already said is to be applied to this claim. There is no doubt of this general rule that trustees are liable to respond to those for whom they act for any profits made by them individually, but this is limited by the proposition in the language of the court of appeals (*Moody v. Smith*, 70 *N. Y.* 598), "a principal may give an agent express power to act in the business of the principal, so that the agent may reap a benefit, and in such case the principal is bound by the acts of their agent." It has been already considered that the shareholders were the real parties interested and that their consent would bind the corporation, and it follows that the corporation would not recover from the trustees, what shareholders had arranged they should individually receive.

This opinion has had in regard solely the right of a member of a corporation to require that corporation to assert for his benefit, a claim for damages in which he may share, when in reality he stands in the shoes of one who took part in the transaction complained of. His want of right to maintain such an action does not affect any claim he may have for individual damage from misrepresentation by the corporation or third parties, nor does it affect the claim of creditors or the liability of the corporation or its trustees to an action by the attorney general.

*Judgment affirmed, with costs.*

TRUAX, J., dissents.

INGRAHAM, J. — [Concurring.] — I concur with the Chief Judge on the ground stated by him that as Catlow was a party to the agreement under which the stock was issued, and received the benefit of such agreement, he would not be entitled to bring such an action as the present one, and that plaintiff's title to the stock he owns and on which he brings his action, having come through Catlow, he can have no greater right as stockholder than his assignor had.

## CHAPTER IX.

## DIVIDENDS. PREFERRED STOCK.

## RE SEVERN AND WYE AND SEVERN BRIDGE R. CO.

1896. 74 *Law Times, New Series*, 219.

(Before ROMER, J., sitting for WILLIAMS, J.)

## SUMMONS.

The Severn and Wye Railway and Canal Company (hereinafter called the original company) was incorporated by Act of Parliament in 1809, and under an Act passed in 1879 (42 & 43 Vict. c. clxiii.) this company and the Severn Bridge Railway Company were amalgamated, and the shareholders were united into one company and incorporated under the name of the Severn and Wye and Severn Bridge Railway Company.

By the last-mentioned Act it was provided that the capital of the two companies should after the amalgamation be kept distinct.

The original company was prosperous in its early days, and paid dividends half-yearly on the production to its bankers of a notice issued by the secretary to the shareholders and on their signing a special form of receipt.

Under the authority of another Act, passed in 1894 (57 & 58 Vict. c. clxxxix.), the amalgamated company sold its undertaking to the Great Western and Midland Railway Companies. Sect. 4 of the Act provided that the amalgamated company should be wound up as if it were a company registered under the Companies Acts 1862 to 1890, and had on the day of the passing of the Act passed a special resolution for winding up voluntarily.

After providing for payments required by sect. 7 of the Act of 1894 it was anticipated that there would be a surplus in the hands of the liquidators of £2000, inclusive of £1238 representing unclaimed dividends declared by the original company prior to March, 1878, and this surplus was, under a proviso to sect. 7 of the Act, to be divided amongst the preference and ordinary shareholders of the amalgamated company in certain proportions.

Prior to the amalgamation the dividends appeared in a dividend ledger of the original company, and this practice was continued in the

same book after the amalgamation and down to the 30th June, 1885, each shareholder having an account in the ledger. In December, 1895, these were written off the dividend ledger and transferred to the general ledger to an account headed "Unpaid dividends," the whole being aggregated, and that account had ever since remained in the general ledger. In the half-yearly published accounts down to June, 1885, these dividends were entered under one item of "Unpaid dividends and interest," but in subsequent half-yearly published accounts they were included in an item called "Sundry outstanding accounts." The company had in some cases paid dividends which had been unclaimed for over six years. The £1238 was made up entirely of unclaimed dividends on stock which represented shares in the original company, such dividends having all been declared more than twenty years ago.

This was a summons taken out by the liquidators for the determination by the court of the question whether two sums of £753 14s. 3d. and £349 4s. 3d. representing unclaimed dividends which accrued upon the stocks respectively held by William Robbins and John Sherborne prior to the year 1874, and which remained in the hands of the liquidators should be paid to their respective legal personal representatives, or whether they ought to be treated as part of the general assets of the company available for distribution as such amongst the preference and ordinary stockholders as provided by sect. 7 of the Act of 1894.

*F. Thompson* for the liquidators.

*Vernon R. Smith, Q. C.*, and *Rowden* for the stockholders of the amalgamated company. — The claims of the legal representatives of Robbins and Sherborne were barred by the Statute of Limitations, if not at the expiration of six years from the time of the declaration of the dividends, at all events at the expiration of twenty years: (*Lindley on Companies* (5th edit.), p. 437). As soon as the dividends were declared an action lay to recover them. From that time the company became a simple contract debtor to the shareholders for the amount of the dividends. The entries in the books of the company were entirely consistent with the relationship of debtor and creditor, and cannot be regarded as a sufficient acknowledgment to take the case out of the statute: *Bush v. Martin*, 9 L. T. Rep. 510; 2 H. & C. 311. They also referred to the Companies Act 1862, s. 16.

*Dibdin* for the personal representatives of Robbins. — The company held the dividends as trustees for the shareholders, and therefore no question on the Statute of Limitations arises: *Smith v. Cork and Bandon Railway Company*, Ir. Rep. 5 Eq. 65; *Gouraud v. Edison Gower Bell Telephone Company of Europe Limited*, 59 L. T. Rep. 813; 57 L. J. 489, Ch.; *Re Lands Allotment Company*, 70 L. T. Rep. 286; (1894) 1 Ch. 616. The company was in a position analogous to that of a partnership. In the case of a claim by one partner against the other time does not commence to run under the statute until after the dissolution of the partnership: *Penny v. Pickwick*, 16 Beav. 246; *Barton v. North Staffordshire Railway Company*, 58 L. T. Rep. 549;

38 Ch. Div. 458. He also referred to Companies Act 1862, Table A, cl. 76; Lindley on Partnership, 6th edit., pp. 511-2; Lindley on Companies, 5th edit., p. 401.

*W. M. Cann*, for the personal representatives of Sherborne, adopted the same argument.

*Vernon R. Smith* replied.

*Cur. adv. vult.*

*March 9.*—*ROMER, J.*, delivered the following written judgment: The liquidators have raised, as they were entitled to do, the defence of the Statute of Limitations in answer to the claims for unpaid dividends, which I have to consider. That defence is, in my opinion, fatal to the claims. The dividends in question were declared and became payable more than twenty years before the present claims were made, and constituted debts due to the shareholders for which they could have sued at law, as was pointed out by Lindley, L. J., in the passage in his treatise on company law (p. 437), which was cited in the argument before me. Presumably, therefore, the Statute of Limitations began to run in favor of the company from the time the dividends became payable.

But the claimants contend that the statute never began to run against them, on two grounds. In the first place, they contend that the company was in the position of a trustee for them of these dividends. In my judgment, this was not so. The declaration that the dividend was payable did not make the company a trustee of it for the shareholders. Nor did the company or its successor, the amalgamated company constituted by the Act of 1879, ever constitute itself a trustee. In the books of the two companies an account was kept as of a liability in respect of the unclaimed dividends. But the entry in the books of a debtor of a liability to a creditor does not constitute the debtor a trustee of the amount of that liability for the creditor. There was no setting apart of any special part of the assets of the companies as being or representing these dividends, nor was there any notice given to the shareholders, nor any step taken by the companies, which, so far as I can see, could be treated as putting the companies in the position of trustees or as preventing the Statute of Limitations from running in their favor.

In the next place, the claimants contend that the statute did not run, on the ground that the shareholders and the company were in the position of partners, or in an analogous position. In my opinion that contention is untenable. Nor can I see that the reasons upon which the rule is founded, that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership, apply to a claim for unpaid dividends between a shareholder of an incorporated company and the company. The case of *Penny v. Pickwick* (*ubi sup.*), relied on by the claimants, was one of a simple partnership which Lord (then Sir John) Romilly held under the circumstances was a continuing partnership. In the case of *Barton v. North Staffordshire Railway Company* (*ubi sup.*) Lord Justice



(then Mr. Justice) Kay decided that where persons entitled as stockholders in a railway company were suing to establish their position as such, their cause of action only arose when the company first refused to treat them as stockholders, and that the Statute of Limitations did not commence to run before that refusal. He did not say that the case was, in fact, analogous to a claim between partners, but only that, if the analogy were applicable, it would support his view, because the statute only runs against a partner from the time of his exclusion.

Nor is the claimants' contention supported by the fact that, for many purposes, the directors of the company are held to be in a fiduciary position with regard to their shareholders as shown by the cases, referred to by the claimants, of *Gouraud v. Edison Gower Bell Telephone Company of Europe* (*ubi sup.*) and *Re Lands Allotment Company* (*ubi sup.*). For these reasons, in my opinion, the claims fail. I should add that, though I cannot find any decision of the English courts on the point I have had to consider, the view I am taking was expressed in the Irish Court of Appeal by Christian, L. J., in the case of *Smith v. Cork and Bandon Railway Company* (*ubi sup.*).

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### LE ROY v. GLOBE INS. CO.

1836. 2 *Edwards Chancery* (N. Y.) 657.<sup>1</sup>

THE facts in this case, as they appeared by the pleadings, were briefly these.

The complainant and Catharine A. Newbold, since deceased, as guardians of infants, were stockholders of the Globe Insurance Company. These persons possessed one hundred and ten shares of its capital stock, the par value of each share being fifty dollars. The said company was incorporated for insurance against loss by fire, with a capital of one million of dollars, and conducted its business in the city of New York.

At a meeting of the directors of the company held on the tenth day of November, one thousand eight hundred and thirty-five, a statement of its affairs, up to the first of December then next, was exhibited by the proper officers and committees of the company, showing a surplus fund, arising from profits then earned and undivided, amounting to seventy-six thousand four hundred and twenty-nine dollars and sixty-nine cents.

On the exhibition of these statements, the directors, by a resolution passed on the same day, declared a dividend of three and one half per centum on the capital stock of the company, for the six months then

<sup>1</sup> Only so much of the case is given as relates to one point. Arguments omitted.  
— Ed.

last past, to be paid out of such surplus profits on and after the first day of December then next. This dividend amounted to thirty-five thousand dollars, which sum, on the thirtieth day of November, one thousand eight hundred and thirty-five, was carried, in the books of the company, to the debit of profit and loss; leaving the capital then entire and a further surplus to the credit of the company, for profits then earned and not divided, amounting to forty-one thousand four hundred and twenty-nine dollars and sixty-nine cents. Notice of this dividend and that it would be paid on and after the first day of December was given in the public papers on the eleventh day of November, one thousand eight hundred and thirty-five. Checks or drafts on the Merchants Bank were accordingly prepared, such checks being severally filled up for the amount of the dividend payable to each stockholder. These checks were all dated the first day of December, one thousand eight hundred and thirty-five. They were signed by Henry Rankin, President, made payable to the order of Richard Dunn, Secretary of the company, and were placed in the hands of the latter, to be endorsed by him and delivered over to the stockholders, as they should call for them, on their signing receipts for the same in the dividend book. Between the first and seventeenth days of December, about four-fifths, in amount, of these checks, were called for by and were delivered to stockholders and duly paid on presentment at the bank.

Among the checks thus filled up and signed, was one for one hundred and ninety-two dollars and fifty cents, intended to pay the dividend due to the complainant and Mrs. Newbold on their one hundred and ten shares of stock and to be delivered to them.

On the night of the sixteenth of December, one thousand eight hundred and thirty-five, the great fire took place in the city of New York: the complainant and other stockholders, to the amount of about one fifth in value, not having then called for their dividends. On the eighteenth of the same December, the complainant applied for the check payable to him and Mrs. Newbold, to the secretary, who, acting under the orders of the directors, refused to deliver it or otherwise pay the dividend, on the ground that the company had sustained losses by the fire above mentioned to an amount which had rendered it insolvent. On application to the directors, the same answer was given; and the dividend remained unpaid.

On the twenty-fifth day of January, one thousand eight hundred and thirty-six, the directors declared the company to be insolvent; and three of them, namely, the defendants, Henry Rankin, Isaac Carow and James Heard, were (under the act) appointed receivers of its estate and effects. The declaration of insolvency and a certificate of the appointment of the receivers, both under the seal of the company, were filed with the clerk of the court of chancery for the first circuit; on the same day and thereupon the receivers took upon themselves the duties of their office and possessed themselves of all the estate of the company, including the unpaid portion of the said dividend.

*T. L. Ogden*, for complainant.

*D. Lord*, for defendants.

McCOUN, VICE-CHANCELLOR. — This case does not necessarily call for a decision of the question, whether, as between the stockholders of an insolvent insurance company and the creditors, the former are entitled to all the surplus which remained with the company undivided at the time of its disaster over and above the entire capital?

Although there is here such a surplus of upwards of forty-one thousand dollars, besides the dividend, amounting to thirty-five thousand dollars, which was declared on the tenth day of November and made payable on and after the first day of December, yet the complainants, in their bill, only claim to have their parts or portions of this dividend, which they have not received, now paid over to them out of the funds in the hands of the receivers, instead of leaving the money there to be applied as assets of the company in discharge of its debts.

The complainants assert their right to the money upon the ground of its having become theirs by an express appropriation and setting apart so much out of the company's earnings for the stockholders and thereby distinguished from the general mass of the company's funds; and I am convinced that enough has been done to produce this separation in the view of a court of equity and to confer upon this amount the character of a trust fund which could not afterwards be diverted to other objects.

The investigation of the affairs of the company and the ascertainment of a clear surplus to warrant a dividend — declaring that dividend by a resolution of the board of directors — fixing the period for its payment — giving publicity to it — carrying the amount on the books of the company to the debit of profit and loss — apportioning the same among the stockholders, by filling up and signing checks upon the bank where the funds were deposited for the purpose of being delivered to each stockholder when called for: — these are all acts which the company, by its officers, might lawfully perform. These acts became binding upon the company in its corporate capacity; and gave to the stockholders individually rights which the directors and officers of the company could not afterwards take from them. If, for instance, they had refused, after the first day of December, to deliver out the checks or make payment of the dividends and no insolvency had intervened, it appears to me there would have been no difficulty in the remedy by mandamus in favor of all the stockholders or by action at the suit of individuals from whom the payment was withheld.

Neither, I apprehend, could there be any valid objection to a bill in equity for the purpose of obtaining possession of the checks or the fund in the bank upon which they were drawn, upon the footing of its being a trust fund which the officers of the company were bound to distribute after the first day of December and over which they had no other control. That the officers of the company considered the money which was deposited to its credit in the bank appropriated to meet the checks

is evidenced by the fact that they went on delivering out checks to such of the stockholders as called for them until the seventeenth of December, when the disastrous fire had occurred; and they would have delivered checks to these complainants in like manner if they had called to receive them. It makes no difference, in my judgment, that the money was not told out and specifically set apart in the bank to meet these checks or that a separate fund was not created for the purpose or that the money intended to meet them still formed a part of the general mass standing to the credit of the company on the books of the bank: for this court can, nevertheless, lay hold of the mass and separate so much as may be necessary to accomplish what was intended and which accident alone prevented at the time. Up to the moment of the prostration of the company, the intention remained, on the part of those who were charged with the management of its affairs, to continue the appropriation and consummate the payment of the dividends which had been nearly completed. It was a matter no longer executory in the view of the parties; and so far as it remained unexecuted this court will now perform it. The intention must be fulfilled; and, for this purpose, a court of equity will consider, not merely the sums which were paid out in dividends, but the whole thirty-five thousand dollars as actually appropriated and set apart for distribution among the stockholders from and after the first day of December and regard it as a trust fund to which the stockholders had acquired vested rights—not in their corporate capacity, but as individuals to whom the money legally and equitably belonged distinct from their other interests in the funds and effects of the company.

Having acquired this right, as between them and the corporation, the assignment or transfer to the receivers could not take it away. The receivers do not stand in the light of purchasers for valuable consideration without notice; and, under such circumstances as exist here, are bound by the trust: *Adair v. Shaw*, 1 Sch. & Lef. 262; *Wood v. Dummer*, 3 Mason's R. 312.

The act of the eighteenth of January, one thousand eight hundred and thirty-six, under which the receivers were appointed, vests in them all the property and effects of the corporation; but, like any other assignment by operation of law, such as in bankruptcy or under our insolvent acts it does not pass trust property—but only such as the bankrupt or insolvent held or was possessed of or entitled to for his own benefit.

I shall decree that the receivers hand over to the stockholders the amount of the unpaid dividend declared on the tenth day of November and payable on the first of December, 1835; . . .

## FORD v. EASTHAMPTON RUBBER THREAD CO.

1893. 158 Mass. 84.

CONTRACT for money had and received. At the trial in the Superior Court, without a jury, before *Aldrich, J.*, there was evidence tending to show that the plaintiff on June 16, 1891, owned fifty-two shares of the capital stock of the defendant company, of the par value of one hundred dollars per share; that on that day the directors passed the following vote, namely, "That a dividend of 20 per cent be paid to stockholders of this date, payable Tuesday, June 23d, 1891"; that on said June 16th the annual meeting of stockholders of the company for the election of directors was held immediately after the meeting of directors, according to custom, and duly elected five directors, as provided by the by-laws of the company, two only of the old directors being re-elected, and no director being re-elected who voted for the twenty per cent dividend, though the two who were re-elected were present at the meeting when it was voted; and that on said June 16th, as soon as the stockholders' meeting adjourned, the directors elected and re-elected thereat met, qualified, organized for the year, and passed the following votes: "That the vote passed by the directors of this company this day declaring a dividend of 20 per cent on the capital stock of the company, payable Tuesday, June 23d, 1891, be reconsidered and rescinded; the same is hereby rescinded. That a dividend of six per cent, payable June 23d instant to stockholders of record this day, be declared in place of the dividend voted at earlier meeting of this board this day." It also appeared that no money was set aside or provided to pay said dividend of twenty per cent, but the company had ample means and facilities for paying the twenty per cent dividend; that always before money had been provided to pay a dividend before it was declared; that money to pay said six per cent dividend was provided after the meeting and before said 23d of June by borrowing, and the same was set aside and deposited in bank therefor; that the treasurer sent the check of the defendant on the bank where the money was deposited to each stockholder of record of said June 16th to pay the dividend on his stock at six per cent, including the plaintiff, on said 23d June, 1891; and that the plaintiff declined to accept the check, and returned the money to the treasurer. It further appeared in evidence that no stockholder of the defendant had been paid the twenty per cent dividend for June, 1891; that a majority of the stockholders had accepted the dividend of six per cent paid by checks as aforesaid on June 23, 1891, in full; that the plaintiff, by his attorney, by letter of June 30, 1891, demanded payment of the twenty per cent dividend from the defendant; and that the plaintiff made no objection to the check of the defendant sent him to pay the dividend of June 16,

1891, except that it was for a dividend of six per cent, instead of twenty per cent.

The defendant asked the court to rule that the directors elected on June 16 had a right on that day to rescind the vote whereby the twenty per cent dividend was declared payable at a future day; and that the plaintiff could not recover. The judge declined so to rule, ordered judgment for the plaintiff, and reported the case for the determination of this court. If the refusal to rule and order of judgment were correct, judgment was to be affirmed; otherwise, judgment was to be ordered for the defendant.

G. M. Stearns, for the plaintiff.

W. G. Bassett, for the defendant.

FIELD, C. J. It seems to be settled that, when a dividend has been fully declared, the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it, if it is not paid on demand. In some cases money or other property equal to the whole amount of the dividend declared has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the *cestuis que trust* of this fund, each entitled to his share. In other cases, the corporation has credited the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders; or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all alike. See *Beers v. Bridgeport Spring Co.* 42 Conn. 17; *State v. Baltimore & Ohio Railroad*, 6 Gill, 363; *King v. Paterson & Hudson River Railroad*, 5 Dutch. 504; *Jermain v. Lake Shore & Michigan Southern Railway*, 91 N. Y. 483; *Hopper v. Sage*, 112 N. Y. 530; *Jackson v. Newark Plankroad Co.* 2 Vroom, 277; *Wheeler v. Northwestern Sleigh Co.* 39 Fed. Rep. 347. When a dividend has been declared payable at a definite future time, but no fund has been set apart for the payment of the dividend, and the corporation meanwhile becomes insolvent, whether the stockholders to the extent of their proportions of the dividend should share ratably with the creditors of the corporation in its property has not, so far as we know, been recently considered, but the decision in *Loweñ v. American Ins. Co.* 6 Paige, 482, is that they should. The setting apart of a fund to pay a dividend has been held to give a lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation. *In re Le Blanc*, 14 Hun, 8, and 75 N. Y. 598. *Le Roy*

v. *Globe Ins. Co.* 2 Edw. Ch. 657. The English Companies' Act, 1862, (25 & 26 Vict. c. 89, § 38, cl. 7,) provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves." Upon these questions, however, we desire to express no opinion.

It has been argued that there is no consideration for the promise of a corporation to pay a dividend to its stockholders, but we think that the doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to such promise. It is the object of a private business corporation to make money for its stockholders, and, under our laws, it is ordinarily the duty of the directors from time to time to declare dividends out of the net earnings, if there are any, and it must be left largely to the discretion of the directors to determine when and for how much such dividends should be declared. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a general sense, the managers; and when a dividend is declared by the directors, the declaration is a determination by a body authorized to make it that the amount of the dividend should be taken from the property of the corporation and paid over to the stockholders. The cause of action of each stockholder against the corporation for non-payment of the dividend does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization, and the relation of the stockholders to the corporation and its property. Unless the rights of creditors intervene, or the corporation is enjoined from paying the dividend, on the ground that the dividend has not been earned, or on some other ground, the amount of the dividend, after it has been declared and has become payable, is considered as property held by the corporation for the use of the stockholders individually, and the stockholders may recover their shares as money or property had and received to their use. We have been able to find little or no authority on the precise question involved in this case, namely, whether, after a dividend has been duly declared by a vote of the directors, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors, held before the time at which the dividend becomes payable according to the vote, when the fact that a dividend has been declared has not been made public, or in any manner communicated to the stockholders, and when no fund has been set apart for the payment of the dividend. On principle, we do not see why the directors may not rescind such a vote, under the circumstances stated. By the vote no specific property passed to the stockholders. If the vote be regarded as a declaration of trust in favor of

the stockholders, it could be revoked before it was communicated to them or any property was identified and set aside for them.) Indeed, cases may easily be supposed of such a change in the affairs of a corporation, between the time when a dividend is declared and the time when it becomes payable, as to make the exercise of such a power by the directors useful, if not necessary, for the successful continuance of the business of the corporation. It appears in the present case that the meeting of the new directors at which the vote was rescinded was held after the annual meeting of the stockholders, but on the same day as the meeting of the directors at which the vote was passed, which was held just before the meeting of the stockholders; and that at the meeting of the stockholders "the president did not, as had for many years been the custom, announce that any dividend had been declared, or promulgate the same to the stockholders"; and it does not appear that any of the stockholders, except the directors, knew of the original vote, or that any of the stockholders had made any contracts, incurred any liability, or done anything relying on the vote. It also appears that no fund was distinctly set apart for the payment of the dividend before the vote was rescinded. As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on the vote, — certainly before the passage of the vote had been made public, or communicated to the stockholders, — it was within the power of the directors, at a meeting subsequent to that at which the vote was passed, to rescind it. In this action at law, we cannot supervise the exercise of this power by the directors.

*Judgment for the defendant.*

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McNAB v. McNAB & HARLIN MANUF. CO., ET ALS.

1891. 69 *New York Supreme Court* (62 *Hun.*), 18.<sup>1</sup>

NEW YORK Supreme Court, General Term, First Department.  
Appeal from Special Term, New York County.

Action brought to compel the division of a surplus among the shareholders. A judgment was rendered, dismissing plaintiff's complaint. Plaintiff appealed.

*Artemus V. Smith*, for appellant.

*Frederic R. Coudert* and *Frederic G. Dow*, for respondents.

DANIELS, J. The McNab & Harlin Company, defendant, was incorporated on or about the 28th of April, 1871, under the laws of this

<sup>1</sup> Only so much of the case is given as relates to one point. — ED.



state providing for the incorporation of manufacturing companies. Its business was declared to be that of manufacturing brass and iron goods for sale, and since its incorporation it has carried on that business. The plaintiff was the owner of 8 shares of its capital stock, which consisted of 150 shares, of \$1,000 each, and the other defendants were officers and shareholders in the company. After its formation, and in or about the year 1877, the company became unable to pay its debts, and a proceeding in bankruptcy was instituted to discharge it from its debts. Soon after the proceeding was commenced the defendant Harlin became the president of the company. He owned seventy-eight shares of its capital stock, and compromised the debts owing to the creditors of the company. The agreement for the compromise was to pay seventy-five per cent. within the period of three years. After he took charge of the affairs of the company as its president, and under his management, the business became prosperous, and the seventy-five per cent. was paid to the creditors, and afterwards they were paid the additional sum of twenty-five per cent., making payment of their demands in full. The prosperity of the company continued, owing to the judicious management of the president, and for eight years prior to the time of the trial, which took place in May, 1891, its net profits amounted to the sum of \$100,000 a year, or a sum slightly in advance of that amount, and from the year 1881 to the year 1891 it made and paid a dividend on its shares amounting to an average exceeding the sum of twenty-five per cent.; and, in addition to the dividends made in this manner, it accumulated a large surplus, which was mainly used in its business, but to the extent of about one hundred thousand dollars was in its deposit accounts. And it was stated by the treasurer in his evidence upon the trial that there was at that time an actual surplus owned by the company amounting to the sum of \$152,209, and the plaintiff, whose action was brought to secure the distribution of the surplus by way of dividends, alleged and claimed that a still larger surplus had been earned and was owned by the company; and it was one of the principal objects of the action to secure the division of this surplus by way of dividends among the shareholders. But it was proved in the course of the trial that the surplus maintained by the company was profitably employed in purchasing the material used by it in the course of its manufactures, and that it was considered for the best interests of the company not to divide this surplus among the shareholders. The directors, in restricting the dividends as they did, seem to have been impressed with the propriety of this conviction, and the dividends were accordingly limited to such amounts from year to year as did not intrench upon the large surplus which had been earned and secured. In their action upon this subject the trustees appear to have exercised the judgment which they deemed to be most consistent with the prosperity and maintenance of the interests of the company, and the statute under which the incorporation took place delegated the authority of the trustees to manage the stock, property, and concerns

of the company (2 Rev. St., 5th Ed., p. 503, § 29;) and to what amount the dividends shall be made, and the extent of the surplus which the interests of the company may require to be retained, are within this delegation of authority confided to the trustees. And it was so regarded in *Williams v. Telegraph Co.*, 93 N. Y. 162, where it was said, with the apparent approval of the court, that "when a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts." *Id.* 192. And no broader principle than this was either stated or sanctioned in *Scott v. Fire Co.*, 7 Paige, 198, or in either of the other authorities which have been brought to the attention of the court. The principle to be applied is that which shall secure the observance of good faith on the part of the directors, and this principle was neither denied nor intrenched upon in *Seeley v. Bank*, 8 Daly, 400, which was affirmed in 78 N. Y. 608. The trustees are chosen by the shareholders, to exercise their best judgment, depending upon their knowledge of the affairs and condition of the company; and when that has been done, the courts do not undertake to control their action, although they might differ in their views of the proper management to be adopted and followed. No reason has been disclosed by the case for doubting or impeaching the good faith of these trustees. Neither can it be affirmed justly, in view of the large business carried on by the company, that they acted unreasonably or capriciously in declining to order a larger dividend than that which was in fact paid to the shareholders.

[Opinion on other points omitted.]

*Judgment affirmed.*

## STRINGER'S CASE. IN RE MERCANTILE TRADING CO.

1869. *L. R.* 4 *Chan. Ap.* 475.

THIS was an appeal from an order of Vice-Chancellor *Malins*, made in the winding up of the *Mercantile Trading Company, Limited*.

The company was registered under the *Companies Act*, 1862, on the 27th of June, 1863. The objects of the company, as stated in the memorandum of association, were the purchase of goods and ships for export and transmission to *America*, for sale or barter and return and sale of goods from thence, and the chartering or freighting of ships, and all other matters necessary for carrying on the operations of the company, or other operations of a similar character. It was, however, admitted that the real object of the company was to trade with the *Confederate States of America*, by running the blockade then maintained by the government of the *Federal States*. For this purpose

they provided a line of ships running from *Bermuda* to *Charleston* and *Wilmington*, which were intended to carry goods from *England* to the *Confederate* government, and to bring back cargoes of cotton in return.

The company had a nominal capital of £150,000, of which about £112,000 had been paid up. The articles of association embodied the rules given in Table A of the *Companies Act*, 1862, which provide, in Rule 73, that "no dividend shall be payable except out of the profits arising from the business of the company, except so far as modified by the articles;" and the articles provided, by Article 5, that "the directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of £5 per cent. on such capital, subject to the resolutions of a general meeting of the company called with reference thereto."

Shortly after the establishment of the company, the directors entered into a contract with the *Confederate* government, under which the *Confederate* government agreed to be co-owners of the ships employed by the company, and that the ships should be owned in the proportion of two-thirds by the *Confederate* government, and one-third by the company; the ownership of the *Confederate* government to be paid for in cotton, at *Charleston* or *Wilmington*, on the basis of 6*d.* per pound for "*Middling Upland*" cotton.

Several successful trips were made by the ships, and although some of them were captured or lost, a considerable profit was at first made by the company on their adventures. In May, 1864, a balance sheet was made out of the state of the company, down to the 29th of February, 1864, showing a profit of £42,718 15*s.* 2*d.*, out of which the directors proposed a dividend to be paid at the rate of £25 per cent. on the capital, amounting to about £28,000. This dividend was adopted by a general meeting of the company, held on the 17th of May.

The balance sheet was submitted to the directors of the *Agra and United Service Bank*, the company's bankers, and was examined by their accountants. The bank then advanced them upwards of £21,000 towards the payment of the dividend to the shareholders, although their account was already overdrawn to the amount of £5000. The dividend received by Mr. *E. P. Stringer*, the managing director, in respect of his shares, amounted to £3560.

The termination of the civil war in *America*, by the success of the *Federal* government, caused the failure of the company, the cotton appropriated to them in the *Confederate States* being all destroyed or captured, and the debt due from the *Confederate* government turning out worthless. The company was accordingly wound up, the only creditor of large amount being the *Agra and Masterman's Bank*, which had succeeded to the business of the *Agra and United Service Bank*. The present application was made by the official liquidator to obtain a repayment by Mr. *Stringer* of the dividend received by him, on the ground that

the balance sheet was delusive, and the dividend really paid out of the capital of the company. The sections of the *Companies Act*, 1862, under which it was contended that the Court had jurisdiction to order the return of the money upon this application, were the 101st and 165th.

The principal objections made to the balance sheet were as follows: First, that the directors had taken credit for a sum of £51,589 due to the company from the *Confederate* government as an asset of the company at its full value; secondly, that they had also taken credit for cotton within the *Confederate States*, which was all subsequently destroyed, at the value of £17,000; and, thirdly, that they had entered the loss of three ships as a loss of only one-third of their value, thus reckoning the guarantee of the *Confederate* government for the other two-thirds at its full value.

The Vice-Chancellor was of opinion that the dividend declared was altogether delusive, and that it amounted to a return of one-third of the capital to the shareholders; but he also held that he had no jurisdiction under the 101st or 165th sections of the *Companies Act*, 1862, to make an order for the return of the dividend; but that it was necessary for the official liquidator to file a bill for that purpose. The official liquidator appealed from this decision.

*Cotton*, Q. C., and *Higgins*, for appellant.

The declaration of the dividend was both in violation of the articles and delusive, amounting to a return of part of the capital. Table A of the *Companies Act*, 1862, which was adopted by the company, forbids payment of dividend out of capital, and the 5th clause of the articles is still further restrictive, providing that the dividends are to be paid out of "profits in hand." So far was the company from having profits in hand that they were obliged to borrow part of the money to pay the dividend from the *Agra and Masterman's Bank*. But the balance could not be called profits in any sense until it was known whether the cotton in the *Confederate States* and the debt of the *Confederate* government could ever be realized. The directors were not justified in putting a value upon what they could not realize, and which it was very doubtful whether they would ever be able to realize. At all events, the value put upon these items was much too high. No cotton in the *Confederate States* or liability of the *Confederate* government bore such a high price in the market at that time as was put upon these items in the balance sheet.

*Glassey*, Q. C., and *H. M. Jackson*, for *Stringer*.

There is nothing in the articles to render this dividend improper. The 5th clause does not mean that the directors were only to pay profits out of money at their bankers. They were to estimate the profits in the usual mercantile way, that is, by valuation of the assets of the company. This was done; there was no concealment on the balance sheet, and it was submitted to the *Agra and Masterman's*

*Bank*, who understood all the circumstances, and would not have advanced the money unless the balance sheet had been honestly made. And yet they are the very parties who are now, through the official liquidator, complaining of it. At that time the prospects of the *Confederate* cause and the security of the government were thought good by most mercantile men, and it is not right to judge of the fairness of the transaction by the result of the speculation.

[The opinion of Sir C. J. Selwyn, L. J., is omitted.]

SIR G. M. GIFFARD, L. J. [After deciding that the Court has power, under the Companies Act, to order a repayment of dividends declared and paid under a delusive and fraudulent balance sheet:]

Now, with regard to this case, the first important matter that we have to consider is the effect of these articles of association, and I quite agree that if the effect of these articles was that you could have no division of dividends until all the transactions were wound up, that you could have no legal dividend except out of what is termed profits in hand, there might be a great deal to be said in this case; but if we look at the articles of association as compared with Table A., it is clearly manifest that the articles of association amount to nothing of the kind. [His Lordship then referred to the provisions in Table A., and in the articles of association, which have been before mentioned, and continued:—] I have no hesitation in saying—especially if you compare the word “may” in Table A., and the word “shall” in the 5th clause, and consider that there are negative words in Table A., and that there are none in this clause—that this clause was intended simply to have this effect, and no other, viz., that when the directors had in their hands profits they should not be able to set them aside for a contingency fund, and that they should then, at all events, be compellable to make a dividend. It did not prevent their making a dividend; but I agree, it must be out of profits, although those profits were not profits in hand.

Then, when we come to the facts themselves—I will not again go through them, for they have been considered at very considerable length, not only in argument, but also by my learned brother—it was not argued or suggested, nor could it be argued or suggested, that it was intended that this thing, though in terms a dividend, should cover what was not really a dividend transaction. The mode in which the matter was done was fair enough. The books were put into the hands of an accountant, calculations were made, and a certain conclusion was arrived at. True it is, no doubt, that these proceedings were full of risk; but although, on the one hand, there might be a great loss, everyone knows that whenever there was a success the profits were something very enormous, and upon the balance sheets as taken from the books it did appear that there was a profit of £42,000, and it was proposed out of that to divide somewhere about £28,000, the profits, I agree, not being profits in hand. The fault that is found with that is, that the

estimate was an erroneous estimate; that too sanguine a view was taken of the prospects of success; and that there ought to have been a very much less sum put upon the face of this balance sheet as assets than really was put there. But I do not think that anyone can say it was not at this date possible for honest persons carrying on this trade, entertaining the view which they did entertain as to their prospects, honestly to make out such a balance sheet as this, and honestly to believe that those were profits fairly divisible between them. As I have said before, this was not done in any underhand manner; the whole thing was patent and open; it was known, or capable of being known, by every shareholder, and if the directors of the *Agra and Masterman's Bank* did not know anything about it, they neglected their duty, and behaved most shamefully to their own shareholders whose money they lent; for the balance sheet was put in their hands, and they had accounts of every description, and they must have known perfectly well that it was neither more or less than a blockade-running company; the very nature of the accounts shewed it; and so far from there being any concealment, the balance sheet itself was put into the hands of the auditors, and no person who knew what the business of the company was could look through that balance sheet without seeing at once that the full value was put upon the *Confederate* government debt, and that the four ships had been lost, and without knowing at once that if things turned out adversely that which was profit might, from subsequent events, become a great loss. Again, this dividend was declared in May, 1864, and was actually paid in June, 1864, and I cannot forget that it was actually paid by the *Agra and Masterman's Bank*, who not only advanced the money, knowing the affairs of the company, but who paid the dividends through the medium of cheques drawn upon them by the shareholders. I think it would be a gross injustice if at this distance of time, when a dividend has been made and paid in this way so long ago as the year 1864, because things turn out adversely afterwards, and the company is wound up in 1867 at the instance of a creditor, such a dividend should be repaid. I quite agree when there has been what can be termed fairly a misappropriation of assets as against a creditor, that creditor has a right in the winding-up to have those assets recouped; but I cannot think that such a dividend as this was in any sense a misappropriation as against either the *Agra and Masterman's Bank* or any other creditors, or that it was in any sense delusive, or in any sense a fraudulent transaction, or that it was any other transaction than this, viz., that mercantile men who were engaged in adventures which might result in very great or even total loss, and which might also result in very great profit, took a sanguine view of what the value of the assets was, looking at what at that date was the actual profit made, and acted upon that *bond fide*, not intending to defraud in any way any person whatever.

Therefore, I am of opinion that this appeal must be dismissed with costs.

## WILLIAMS v. BOICE.

1884. 38 *New Jersey Equity*, 364.

BILL for relief. On general demurrers.

*Mr. T. N. McCarter*, for H. M. Traphagen.

*Mr. H. M. T. Beekman*, for Tierney, Moore, H. Traphagen, and D. and A. Post.

*Mr. F. McGee*, for Clark and Murray.

*Mr. W. B. Williams*, in *pro. pers.*

THE CHANCELLOR.

The bill is filed by the receiver of the City Bank of Jersey City against a number of persons to recover dividends paid to them or those whose personal representatives they are, on and after January 3d, 1876, out of the assets of the bank, on its stock held by them. The bank was incorporated under the act of the legislature of this state entitled "An act to authorize the business of banking." The amount of its capital stock was \$100,000, all of which was subscribed for, but only fifty per cent. of it was called for or paid in. It began business January 2d, 1872, and continued it down to January 9th, 1883, when it stopped payment and suspended business. The next day it was, on proceedings in insolvency in this court, under the act concerning corporations, adjudged insolvent, and the complainant was appointed receiver. The bill states that the assets are insufficient to pay the debts, and that the deficiency is about \$175,000. It also states that the corporation declared and paid sundry dividends on the fifty per cent. of capital paid in, which at the time were alleged by the bank officers to be declared and paid out of its earnings, but it alleges that those dividends, on and after the 3d of January, 1876, were declared and paid at times when, by reason of losses and expenses in business and diminution of assets by improper and unauthorized acts of the officers, the assets were insufficient to pay the liabilities to depositors and other creditors without impairing the capital paid in; so that there were no profits at those times out of which to pay the dividends; and that so far as they were actually paid they were paid out of the capital paid in; that because of the deficiency, which is about \$125,000, after applying the amount of the capital not paid in, the dividends so declared and paid are subject to recall from those who received them or their personal representatives. The amount of those dividends is far less than the amount of the deficiency. The bill is filed against those of the stockholders who received the dividends and who are still living, except those who have repaid them or are out of the jurisdiction, and against the personal representatives of those who are dead, except where they died insolvent. The demurrants are Herbert R. Clarke, Charles H. Murray, Daniel T. Moore, Henry M. Traphagen, Henry Traphagen, Myles Tierney, and David Post and Albert Post.

The principal grounds taken by the counsel of the demurrants are that the bill cannot be maintained, because the defendants are not liable to the suit, inasmuch as the legislature has provided that the directors shall be liable to repay dividends not declared out of the profits of a corporation; that the bill is multifarious; that the remedy, if it exists against the defendants, is at law and not in equity; that if this suit can be maintained, the allegation that the payment of the dividends impaired the capital paid in is not sufficient; and that it is not alleged that there were not profits out of which to pay the dividends; that there is no allegation that any of the existing debts or liabilities existed at the time of the payment of the dividends; that there is no allegation that there were not enough assets to pay the then existing debts at the times of the payment of the dividends, and that there is no averment that there are not now assets enough to pay the debts which have been proved in the insolvency proceedings.

It is undeniably true, as a general proposition, that stockholders are liable in equity to repay, for the benefit of the creditors of the corporation, money which has been paid to them out of the capital stock. This is not based on any statute, but upon the equitable ground that the stock is regarded as a trust fund for all the debts of the corporation, and no stockholder can entitle himself to any dividend or share of it until all the debts are paid. *Story Eq. Jur.* § 1252. And the remedy is in equity and not at law. The truth of the proposition as a general one is not denied, but it is insisted that by force of our statute concerning corporations the liability has in this state been transferred from the stockholders who may be, and most often are, ignorant of the true condition of the corporation when the dividend is paid, to the directors who do know it, and who are the persons really in fault. By the seventh section of that act it is provided that it shall not be lawful for the directors of any bank or moneyed or manufacturing corporation in this state, or corporation organized under that act, to make dividends, except from the surplus or net profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the corporation, or to reduce the capital stock except according to that act, without the consent of the legislature, and that in case of any violation of the provisions of that section the directors under whose administration it may happen, shall, in their individual and private capacities, jointly and severally be liable, at any time within the period of six years after paying any such dividend, to the corporation, and to the creditors thereof, in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced, with legal interest from the time the liability accrued; provided, that any of the directors who may have been absent when the act was done or resolution passed, or who may have dissented from it at the time, may exonerate themselves from liability by causing their dissent to be entered at large on the minutes of the directors at the



time or immediately after they have notice of it, and causing their dissent to be published in a newspaper of the county where the corporation has its office or place of business. *Rev.* p. 178. The statutory liability thus created, however, does not exonerate the stockholders who have received the money from liability to repay it for the benefit of the creditors. The statute does not transfer the liability from the stockholders to the directors, but it creates a liability on the part of the latter in favor of the corporation or the creditors in certain events. The section is penal, and so far as it gives a remedy to the corporation it is for the benefit of stockholders as well as creditors. So far as the latter are concerned, it provides what may be an easier and more economical mode of recovery than suit against the stockholders. It might be very difficult to reach the stockholders (there might be a very large number of them, and they might be greatly scattered, or might be all non-residents), while it might not be difficult or not so difficult to reach the directors. The stockholder who has received part of the capital by way of dividend, without legislative authority, has no right to it as against the creditors of the corporation, and no wrong is done him if he be compelled to repay it when it is required to pay the debts of the corporation. He or those from or under whom he derives his title to his stock, placed that money in the treasury of the corporation to answer for its debts if necessary, and it was devoted to that object so long as it might be required for the purpose. If he withdraws or receives it back again, except where the amount of the stock is reduced according to law, it will in his hands be subject to that trust, the trust for the payment of the debts of the corporation if needed for the purpose. The directors who declare the dividend may personally profit but little comparatively from the dividend, and yet under the above-quoted section of the act they may be compelled to pay the whole of it to the corporation or creditors out of their own pockets. But that provision does not, either in terms or by implication, exonerate the stockholders, though a recovery of the money from the directors would in fact exonerate them. The directors are their agents, and if redress has been obtained by recourse to the agent, it would of course exonerate the principal. The remedy given by the statute is cumulative. The legislature does not say that the stockholders shall be at liberty to keep the money, and that the creditors must have recourse to the directors alone. The bill, it may be remarked, alleges that the stockholders who received the dividends had notice of the fact that the money was part of the capital paid in, and also of the fact that without that money there was a deficiency of assets to pay the debts.

Nor is the criticism that the bill does not state that there were no profits out of which to pay the dividends, well founded. The bill states that there was a deficiency of other assets besides the money divided, to pay the debts. It states that when the dividends were declared the assets were, by reason of losses and expenses in business and diminution by improper and unauthorized acts of the officers, insufficient to

pay the liabilities of the bank to depositors and other creditors without impairing the \$50,000 of capital paid in, so that there were no profits at such times out of which to pay those dividends, and so far as they were paid they were paid out of the capital paid in.

Another objection is that there is no allegation that any of the debts which now exist were debts or liabilities at the time of the payment of the dividends. The bill makes no such statement, nor is the fact fairly to be deduced from its statements. Although there are cases in which it has been said that recovery can only be had in cases of this kind by creditors whose debts existed at the time of the withdrawal of the funds, that view is not to be adopted. The distinction is not well founded. The capital of a corporation is a fund pledged for the payment of its debts. Each person who gives credit to it does so in the confidence that that fund exists for his protection and security against loss. If the stockholders secretly withdraw it, under the false pretence of dividends of profits when there are none, it is obvious that as great a wrong may be done to future creditors as to existing ones. In either case the stockholders hold a part of that fund, which is pledged to the payment of the creditors. The injury to the existing creditor is obvious. That to the future creditor is the same; for the stockholder holds out to him that the capital is of the nominal amount, while in fact he has secretly withdrawn part of it. If all who should become creditors after the withdrawal had notice of the fact that the capital had been reduced — that the dividend had been paid out of the capital — then the distinction might perhaps be maintained, but they not only have no such notice, but in fact are led to believe that the capital is what it nominally purports to be.

The objection that the bill does not state that there were not enough assets to pay the debts when the dividends were made is founded on a misapprehension as to the statements of the bill, for the allegation is distinctly made.

Nor is the objection that it does not appear that there are not enough assets now to pay the debts which have been proven, tenable. It does not appear what debts have been proven, and it cannot appear until after this court shall have made a decree of distribution what debts will be allowed. For the purposes of this suit, it is not necessary to make any allegation on that head. After applying the assets and capital not paid in to the payment of the debts, there will, as before stated, remain a deficiency of about \$125,000. The whole of the dividends declared on and after January 3d, 1876, amounts to about \$15,000.

Nor is the objection of multifariousness well taken. The stockholders who are called upon to make contribution are necessary parties, and should all be made parties unless good reason exists to the contrary. In *Wood v. Dummer*, 3 *Mason* 308, which was a suit by creditors of a bank against some of the stockholders for payment of debts, on the ground of a fraudulent division of the capital stock of the

bank by the stockholders, the objection of *non-joinder* was made, and it was insisted that all the stockholders ought to be made parties defendant, because all were liable to contribute. The objection was overruled on the ground that it would be impracticable to bring in all the stockholders. In *Vose v. Grant*, 15 *Mass.* 505, and *Spear v. Grant*, 16 *Mass.* 9, the stockholders of an incorporated bank, after the expiration of its charter, had made dividends of the capital stock among themselves, so that there were not enough corporate funds left to pay its debts, and a creditor brought suit as for a tort against one of them who had received his proportion of the dividends. It was held that he could not maintain the suit at law, but that a court of chancery, where suit could be brought by or in behalf of all the creditors against all the stockholders, would be the appropriate forum. It is very clear that there is no ground whatever for the objection of multifariousness.

It remains to consider another question not raised on the argument, viz., whether limitation from lapse of time, in analogy to the bar of the statute of limitations, can avail the defendants. I am of opinion that it cannot. When it is considered that the withdrawal of part of the capital, under pretence of a division of profits where there are no profits to divide, is a fraud on the creditors, it will be seen at once that a plea of such limitation could not, except under peculiar circumstances, be successfully interposed to bar the claim of creditors for relief against the doers of or participants in the fraud. The case is very like that of a trustee secretly applying the trust property to his own use. He cannot thus protect himself against the claim of his *cestui que trust*. In *Wood v. Dummer*, *ubi supra*, this question was considered by Judge Story, who said that the rights of the plaintiffs in that case accrued as against the defendants within six years; for until a refusal of payment by the bank, followed by an inability to pay on its part, there was no cause of proceeding in equity against the stockholders; that in cases not of constructive, but of express trusts, so long as they are not encountered by an adverse possession and denial of right, the statute of limitations does not begin to run. He added that he should have very great difficulty in allowing a bar of the statute of limitations to operate in a case of this nature, unless where the circumstances of negligence on the one side and of positive denial of right on the other were very cogent. In the case before me the bill was filed June 20th, 1883. The complainant seeks to recover dividends declared on and after January 3d, 1876. The bank stopped payment January 9th, 1883, and the receiver was appointed the next day. The defendants could not avail themselves of the plea of limitation from lapse of time. The demurrers will be overruled, with costs.

*W. D. Jones*

## BRIGHT v. LORD.

1875. 51 *Indiana*, 272.

From the Marion Superior Court.

*J. E. McDonald, J. M. Butler, H. W. Harrington and H. Francisco*, for appellant.

*N. B. Taylor, F. Rand, E. Taylor, B. Harrison, C. C. Hines and W. H. H. Miller*, for appellees.

BIDDLE, C. J. — The facts averred in the appellant's complaint are as follows :

That on the 1st day of April, 1873, the appellant entered into a provisional contract with John M. Lord, John Lord, and Charles M. Lord, by which they agreed to sell to the appellant five hundred and twenty shares of the capital stock of the Indianapolis Rolling Mill Company, of fifty dollars each, for the sum of thirteen thousand dollars, at the option of the appellant, to be by him taken at any time on or before the 18th day of June, 1873, to be paid for on delivery ; that before the expiration of said option, on the 14th day of June, 1873, the said Lords, for the consideration of one hundred dollars, to them paid by appellant, extended the time of said provisional contract for thirty days, within which time the appellant paid the Lords thirteen thousand dollars, and received the stock, which, on the 16th day of July, 1873, was duly transferred to him on the books of the Rolling Mill Company ; that the appellant purchased the stock without the reservation of any dividends or earnings, and with all the benefits and interests that pertain to the same ; that on the 3d of July, 1873, the board of directors of the Rolling Mill Company declared a dividend on the capital stock of the company of five per cent., to be paid on the 1st day of August ensuing, amounting, on the stock, etc., purchased by the appellant, to thirteen hundred dollars, which the appellant claims ; that the company was about to pay the said thirteen hundred dollars to the Lords, who also claimed the amount. Prayer to restrain the company from paying the thirteen hundred dollars to the Lords, to decree the amount to the appellant, and for general relief.

The Rolling Mill Company was served with process, but made default.

Interlocutory proceedings were had after complaint and before answer, but as no question is raised upon them, they are not stated.

The Lords answered by a general denial. The case was submitted to the court for trial, which resulted in a finding for the defendants. Motion for a new trial overruled. Exception. Appeal to the general term, where the judgment was affirmed, from which an appeal was taken to this court.

The only error assigned here is in affirming the judgment at the

general term. The evidence is before us, and we think it fairly proves the allegations in the complaint.

Was the appellant entitled to the dividend declared while it was optional with him to purchase or refuse the stock, and before the purchase was completed? This is the sole question in the case.

Where a stockholder in a railroad assigned and transferred his stock after two years interest had accrued, which, by a resolution of the company was payable annually, and had been carried to the account of the stockholder, it was held that the interest did not pass by the assignment of the stock; the court stating the rule to be, that "the interest follows the principal, as an incident to it, so long as it remains an incident; but when it is separated and set apart from the principal by actual payment, or by being carried, when due, to the credit of the owner of the principal in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjoined from the principal as to cease to be an incident to, and does not follow it." *The City of Ohio v. The Cleveland, etc., R. R. Co.*, 6 Ohio St. 489. And in the case of *Jones v. The Terre Haute & Richmond R. R. Co.*, 29 Barb. 353, it was held, that "where, by a resolution of the board of directors, a dividend is made to the persons then holding stock, without any discrimination, out of the surplus earnings of the corporation for a given period, payable at a future day, all who are stockholders on the books of the company, at the time the dividend is declared, are entitled to share therein." This case seems to us as being remarkably similar to the one before us. It has also been held that the purchaser of a share of stock in a corporation has the right to receive all future dividends, from whatever source the profits may arise, provided he remain a member of the corporation until a dividend is made. *March v. The Eastern R. R. Co.*, 43 N. H. 515.

The same rule was recently held in England. The testatrix was owner of certain shares in the South Australian Banking Company. On the 7th day of June, 1865, dividends were declared by the company, payable on the 15th of July, 1865, and on the 15th of January, 1866. On the 31st of December, the testatrix died, having made her will, devising the stock, in 1863.

The question arose as to whether the dividend due on the 15th of January, 1866, passed to the devisee, or belonged to her residuary estate.

Sir W. Page Wood, V. C., said: "As soon as the dividend was declared, although payment, for convenience of the company, was postponed until the following January, from that moment the testatrix became entitled to it, although she could not have then recovered it, and it would have passed to her legatee had she specifically bequeathed it." *De Gendre v. Kent*, 4 Equity Cases, 283.

In an American case, still later, it was held that a dividend belongs to the owner of the stock, at the time the dividend is actually declared,

and that dividends made to the stockholders after the death of a testator belong to the widow who owns the stock, but if made before, although payable afterwards, they will pass by the devise. *Brundage v. Brundage*, 65 Barb. 397.

In support of this general principle, see, also, *In re Foote*, 22 Pick. 299; *Clapp v. Astor*, 2 Edwards Ch. 379; *Phelps v. Farmers and Mechanics Bank*, 26 Conn. 269; *Hyatt v. Allen*, 56 N. Y. 553.

From the authorities and upon principle, we think the rule may be deduced, that whoever owns the stock in a corporation at the time a dividend is declared owns the dividend also; and a sale of the stock afterwards will not carry the dividend with it, though it may not be paid, or payable, until after the sale. The same rule governs in the sale of bonds or other securities, where the interest is payable at stated periods, as upon coupon bonds; but when the interest is accruing from day to day, whatever is due on the bond or other security at the time it is sold, will pass with it. The reason of the distinction is, that when the interest accrues from day to day, it is divisible and payable at any time; but when the interest is payable at stated periods, no part of it is due until the period arrives; and in the earnings or profits of stocks, it is impossible to know what amount is due until the dividend is declared.

In the case before us, Bright did not become the owner of the stock until the 16th day of July, 1873. Up to that time, it was optional with him to purchase it or refuse it. The Lords would have had no remedy, if Bright had refused the stock, and Bright would have suffered no loss, except the consideration he had paid for the option, and incurred no liability, whatever. The dividend had been declared on the 3d day of July, 1873, and the amount fixed, by which it became the property of the Lords at that time, although not payable until the 1st day of August ensuing; and there is nothing in the complaint to inform us but what Bright knew all these facts at the time he completed the purchase of the stock. At least, ordinary business diligence would have informed him of the facts, if he did not actually know them, and then he could have purchased the stock, as it then stood, or not, at his option. As he has not averred in his complaint that he did not know these facts, and could not have ascertained them by ordinary business diligence, he must be held to have known them, and to have made his purchase accordingly.

The judgment is affirmed.

## TAFT v. HARTFORD, PROVIDENCE, &amp; FISHKILL R. CO.

1866. 8 *Rhode Island*, 310.<sup>1</sup>

Assumpsit for the recovery of the amount of dividends, at ten per cent. per annum, for eight years, upon 402 shares of the capital stock of the defendant corporation, (as the plaintiff argues,) “not as arrears of dividends unpaid, but as their equivalent, as *damages*, for the non-performance of the defendants’ contract that they should be paid.” The case was submitted upon the pleadings and a statement in writing of the facts.

On Oct. 25, 1854, the corporation had only common stock. At a meeting of the stockholders held that day, acting under an amendment to the charter, the following votes were passed:—

“*Voted*, That five thousand shares of one hundred dollars each be and the same are hereby created and added to the capital stock of this company, and that the same be a preferred and guaranteed stock, entitling the holder thereof to preferred and guaranteed dividends equal to ten per cent. per annum, payable semi-annually. And no dividend shall be paid on the remaining shares of said stock until such semi-annual dividends, at the rate of ten per cent. per annum, above mentioned, shall first have been paid on said guaranteed or preferred stock. *Provided*, that said preferred stock shall be issued on the express condition following, viz.: that at any time after the first day of April, 1860, or after the first day of April, 1865, as the directors shall decide, said company reserve, and shall have the right to redeem and extinguish the whole or any part of said preferred stock, by paying to the holder thereof, on the books of said company, the par value of one hundred dollars for each and every share held by him, her or them, and that, at any time after the time or times fixed by the directors, any holder of said preferred stock shall have the right to demand and receive for the whole or any part thereof, one hundred dollars for each share, and all right to further dividends on said preferred stock, that shall have been so paid for or redeemed, shall thereafter cease and determine.

“*Voted*, That the guaranteed dividend of ten per cent. on such preferred stock, to all subscribers who pay for the same in money previous to said first day of April next, shall begin to accrue on and from the day when the money for said stock shall have been paid to said company.”

Subsequently a circular was issued offering the new stock to subscribers, and containing, *inter alia*, the following statement:—

“Guaranteed dividends, at the rate of ten per cent. a year, will commence from the time when the money is actually paid for said preferred stock.”

<sup>1</sup> Statement abridged. Portions of argument omitted.—Ed.

Subscribers for the new stock received certificates in the following form : —

BE IT KNOWN, That                      entitled to                      shares in the preferred and guaranteed stock of the HARTFORD, PROVIDENCE AND FISHKILL RAILROAD COMPANY, on which one hundred dollars, on each share, have been paid, subject to the provisions of the charter, and the by-laws of the corporation, the same being entitled to preferred and guaranteed dividends, at the rate of TEN PER CENT per annum, payable semi-annually, before any dividend shall be paid on other stock of said company; and being redeemable by the company, and the par value thereof demandable by the holder of the same, from the company, at any time after April 1st, 1865.

No dividends were earned by the corporation.

*Durfee* and *Eames*, for plaintiff.

The word guarantee, though most usually employed to designate a contract by which one person becomes answerable for another, is not unfrequently employed to express an unusually emphatic assurance of a party in his own behalf, as in Section 4, Article IV., of the Federal Constitution. Will the Court say that a word which is constantly selected by the company to *characterize* and *denominate* the subject to which it applies, is simply tautological?

Could the company have supposed that the subscribers for stock would expurgate or ignore the word “guaranteed,” or would interpolate after it, the incompatible qualification, “if the net earnings of the road suffice for the payment of such dividends?”

Suppose that, for ten years after the issue of the new stock, the company barely make enough to pay interest and expenses; and that at the end of ten years they redeem the new stock and the road becomes prosperous. According to the view which we are combating, the subscribers are not entitled to dividends for the ten years that are gone, because none were earned; and they are not entitled to dividends for the future, because they have ceased to be stockholders.

And, as to the word “dividends,” we maintain that it was not used by the parties in its ordinary sense, as signifying a certain proportion of the earned profits of the road; but as signifying that the holders should be entitled to receive, in value, what was *equivalent* to ten per cent on the amount which they had paid from *the time of payment*; . . . The expression is equivalent to the word interest at the fixed rate.

But even if the word “dividends,” as used in connection with the word “guaranteed,” means, in its true import, dividends out of the net earnings of the road, as claimed by the defendants, the defendants do not advance a step in the defence to the action. If the dividends



were to be paid out of the net earnings of the road, they were, nevertheless, guaranteed or stipulated to be paid out of such net earnings. In other words, the guaranty was, that the net earnings should be sufficient to pay a dividend equal to ten per cent per annum; and if the result was that such earnings were insufficient for that purpose, there was none the less a breach of the guaranty, on the part of the defendants, that they should be sufficient, for which an action will lie to recover, by way of damages, the amount which the plaintiff would have received if such net earnings had been sufficient to pay the stipulated ten per cent.

*Currey* (*Blake* with him), for defendants.

[Argument omitted].

BRADLEY, C. J. The defendant corporation was authorized, by an amendment to its charter, to issue five thousand shares of additional stock, and to provide that the same be "a preferred and guaranteed stock, entitling the holder to preferred and guaranteed dividends equal to ten per cent. per annum, payable semi-annually." Pursuant to this authority this stock was issued, and the certificates entitled "preferred and guaranteed ten per cent. stock," contained the expression, "the same being entitled to preferred and guaranteed dividends at the rate of ten per cent. per annum, payable semi-annually, before any dividend shall be paid on any other stock in said company." This suit is brought to compel the company to pay the plaintiff, holding a portion of said stock, a sum of money equal to ten per cent. per annum on his stock, though no dividends have been earned.

The question presented is, what is the meaning and engagement of the company, as expressed in these words? The relations between these parties are obviously those between shareholders and the corporation. They are not, on the face of the contract, those of creditor and debtor. A corporation may issue bonds or other obligations convertible at certain times and upon certain contingencies into stock. They may issue stock, as in this case, redeemable at a certain time and upon certain conditions. But until such change is made in either case, the original relation remains. A holder of the stock retains his right to share in the management of the corporation and to participate in its profits. He is not its creditor by virtue of this relation. If he is to be constituted its creditor, there are well-known modes and words by which that relation can be expressed. If, instead of adopting them, he receives a certificate of stock, and then claims to be both its creditor and stockholder by virtue of the same contract, the burden is upon him to show that such anomalous relation exists. The presumptions of law and the usual course of business are against him. In this case, the evidence of the relation is a certificate of stock, and the subject of the engagement or contract is the dividends, so called, to be paid upon it. A dividend is money paid out of profits by a corporation to its shareholders. A preferred dividend is that which is paid to one class of shareholders in priority to that to be paid to another class.

The word over which the controversy arises in this case is "guaranteed." Guaranteed, in addition to preferred, applied to dividends, means what? It is certainly not used in the strict and proper sense of the word, for there is, in this contract, no third party promising to make good an engagement by the corporation to its stockholders. Is it, on the one hand, an instance of that tautology so common in legal proceedings, — a synonym for "preferred," and not increasing its significance? Or does it, on the other hand, when it is added to the word dividend, entirely change its character and meaning, and convert a dividend, which, in its nature, cannot legally exist except when originating in profits, into a liability entirely independent of the pre-existence of such profits? Or has it still a third signification, by which, added to the idea of a simple preference out of dividends, it shall be considered as an engagement that a dividend, equal to the sum of ten per cent. per annum, shall be charged upon all the profits which, from year to year, may accrue, thus binding and pledging the total sum of all the earnings of the company, so long as the engagement lasts, to the payment of a dividend "equal to," as the amended charter says, — "at the rate of," as the company express it, — as much as ten per cent. per annum, if semi-annually paid, would amount to, and this amount to be paid before the other stock receives anything.

Intervening the two arguments in this cause, the Court examined, and desired the counsel to examine, beyond our own libraries, the decisions of the courts upon this subject, to see if this somewhat anomalous expression had received a judicial or practical construction. Among the emergencies so common to these railway companies in our country, and in that from which we derive our language and so much of our law, we thought it not unlikely that similar circumstances had induced similar contracts, and that the language used by this company, doubtless under the advice of counsel, might have been taken from railway legislation, or contracts elsewhere, and with a full knowledge of its legal and practical meaning. In this country we found no decision throwing light on this question. In England, however, there are several. The most apt of these cases is, perhaps, *Henry v. The Great Northern Railway Company*, 3 Jurist, part i. p. 1,133. An act of Parliament in that case authorized the company "to guarantee the payment of dividends," not exceeding a certain per cent., "and in preference to the payment thereof on other shares." The question is this, as in the other English cases over similar words, was between what we have indicated as the first and third construction. It has never been even claimed in the English courts that the construction secondly stated by us, and urged by the plaintiff, could be adopted, and the court decides that these statutes guarantee to the favored stockholders "a charge on all accruing profits at the stipulated rates, before anything is divided among the ordinary shareholders. This is substantially *interest* chargeable exclusively on profits." And they further hold that if the profits, accrued when the dividend is declared, are insufficient to furnish

the stipulated amount, *the deficiency is a charge upon subsequent profits.* Again, in *Crawford v. North Eastern Railway Company*, 3 Jurist, N. S. part i. p. 1,093, Vice-Chancellor Wood says, in conclusion: "Of course, I do not mean to say that it is a guaranty in any other sense than that you are to be paid these sums out of the profits of the company. That is the only fund you are to look to. If the company make no profits you will have no dividend, but, I apprehend, the profits in perpetuity." In *Matthews v. Great Northern Railway Company*, 5 Jurist, N. S. part i. p. 284, the Vice-Chancellor says of the term "guaranteed share:" "It must be a guaranty limited, at least, to the whole profits made by the railway."

Without dwelling longer upon this and similar authorities, it is perfectly apparent that the guaranty of a dividend by a railway company is considered by the courts, and, it seems from the course of the argument by the counsel in these causes, who, doubtless, faithfully represent the interests and wishes of their clients, by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed; and as the statement of facts admits that dividends have not been earned in this case, the plaintiff, if there were no other difficulties in his way, could not recover, and we must give judgment for the defendant.

## CHAPTER X.

RIGHT OF CREDITOR OF CORPORATION TO BRING SUIT IN  
REFERENCE TO CORPORATE MANAGEMENT.

## MILLS v. NORTHERN RAILWAY OF BUENOS AYRES CO.

1870. *L. R. 5 Chan. Ap.* 621.<sup>1</sup>

APPEAL from an order of STUART, V. C., granting an interlocutory injunction against the corporation. The company was registered under the Companies Act, 1862. The capital was divided into guaranteed preference shares, deferred preference shares, and ordinary shares. An agreement was made in 1862 between the company and the firm of E. Murray & Co., which consisted of J. R. Croskey and Eugene Murray, that the firm should construct certain works for a stipulated price. The agreement contained a clause for referring questions between the parties to arbitration.

The works were performed by E. Murray & Co., and they received certain payments; but they still claimed £64,849 from the company, partly under the contract and partly for extra work. This claim was disputed by the company, who, on the contrary, claimed that a large sum was due from the firm to the company, by reason of the firm's default in the performance of the contract.

In 1870 the directors issued a report recommending that the sum of £16,491 19s. 8d. "net profits" should be applied in payment of certain arrears of dividend due to the guaranteed preference shareholders. The directors explained that they had been using revenue for purposes which might have been legally charged to capital, and recommended that certain sums which had been paid out of revenue should now be treated as payments on account of capital, and considered as having been borrowed for the purpose of capital from the revenue; and that the amount thus to be treated as a payment on account of capital should be afterwards discharged out of a sum of £20,000, which they purposed to raise by issue of debentures at £6 per cent. The report also recommended the conversion of the tramway between certain points into a railway. This report was adopted at the general meeting of the company.

<sup>1</sup> Statement abridged. Part of opinion omitted. — Ed.

The plaintiffs in the present bill are Mills, executor of Eugene Murray, and Spratt and Stebbing, assignees of J. R. Croskey. The bill alleged that Mills, as executor of Murray, held some fully paid-up deferred preference shares. It alleged that the plan of the directors was to create an apparent or fictitious fund for the payment of shareholders; that the effect of the proposal was to increase the liabilities of the company by the issue of debenture stock, for the purpose of borrowing money, in order to distribute the same among the shareholders under the guise of revenue. The bill prayed for an account and payment of what was due to the plaintiffs under the contract, and for other works; and for an injunction to restrain the company from carrying out the proposal in the report, and from issuing any debenture stock or applying any money raised by debenture stock on debentures in payment of any dividend to any of the shareholders, and from declaring or distributing any dividend until they had paid or made provision for paying what was due to the plaintiffs; and also from converting the tramway into a railway until the company had duly increased their original capital. The plaintiffs moved for an injunction in similar terms. STUART, V. C., granted an injunction as prayed till further order. The company appealed.

Sir-Roundell Palmer, Q. C., Mr. Greene, Q. C., and Mr. Locock Webb, for appellants:—

Secondly, the Plaintiffs, as simple contract creditors, with no lien on any part of the property of the company, cannot sustain such a bill as the present, which seeks to interfere with the management of the company and restrain the payment of dividends.

They were stopped by the Court.

Mr. Dickinson, Q. C., Mr. Marten, and Mr. E. C. Willis, for plaintiffs:—

With respect to the Plaintiffs' claim as creditors, it is true that the simple creditors of an ordinary partnership cannot file a bill to restrain the partners from parting with the assets or dividing the profits; but that is a case of personal liability only. The Plaintiffs, on the contrary, are creditors of a limited company, and gave credit, not to the shareholders, but to the assets of the company. It would, therefore, be unreasonable if they could not restrain the wasting of those assets. Suppose the case of a company whose shareholders have all fully paid up their calls, and yet the railway, or other works from which all the profits proceeded, had not been paid for. Would the Court allow the directors to go on paying away all the profits to the shareholders without providing for the payment of the contractors? In what other way could the contractors look for payment? There can, in fact, be no net profits till the works and plant are paid for.

With respect to the proposed scheme of the directors, it is clearly *ultra vires*. It is a scheme for paying the dividends by means of a

loan, which the Court will not sanction: *Macdougall v. Jersey Imperial Hotel Company*.<sup>1</sup> The conversion of the tramway into a railway is not a trifling matter, and to do it without increasing the capital of the company would be in direct contravention of the memorandum of association.

LORD HATHERLEY, L. C. : —

The Vice-Chancellor appears to have formed his judgment in this case, partly at least, upon the view which he took that one of the Plaintiffs, Mr. *Mills*, was a shareholder in the company, and therefore had a right to interfere. But, so far as the case rests on the simple fact of the Plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor in that case is to obtain his judgment and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, “Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company’s deed, to see whether or not they are doing what is *ultrà vires*, and to interfere in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment.”

The case must have occurred, of course, many years ago, before joint stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands; yet I have never before heard — and I asked in vain for any such precedent — of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case, of course it would apply not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company.

That being beyond any doubt, I come next to the question whether these persons are shareholders or not. But I do not propose to decide that question, for this reason, that I cannot find even an averment —

<sup>1</sup> 2 H. & M. 528.

and the bill appears to be demurrable upon that ground — of anything being done *ultrà vires* by the company. There are two things complained of — one, that the company are going to raise debentures for purposes illegitimate; the other is, that they are about to establish what is called a railway instead of the existing tramway. Now let us look at what the objects of the company are.

[The learned Judge *held*, that there was nothing *ultrà vires* in the proposed action of the company. The opinion concludes as follows:]

Therefore, even if we assume the Plaintiffs to be shareholders, as to which more argument and more investigation might be required if it were necessary to determine that question, the Plaintiffs have shewn nothing *ultrà vires*; and, counting them as creditors, the case is utterly unfounded as regards both principle and authority. I think, therefore, that the motion for an injunction ought to have been refused with costs; and I make an order to that effect.

## POND v. FRAMINGHAM & LOWELL R. CO.

1881. 130 Mass. 194.

MORTON, J. This is a bill in equity, the substantial allegations of which are, that the plaintiffs are creditors of the defendant corporation; that the corporation is insolvent; that all its property is mortgaged to trustees for the benefit of one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property; that it is about to execute a lease to said attaching creditor, for the term of nine hundred and ninety-nine years, at a rental which will not pay the interest upon its indebtedness; and that the execution of said lease would be injurious to the interest of its creditors and stockholders. The prayer is for an injunction to restrain the defendant from further prosecuting its business, and for the appointment of receivers.

There is no statute giving this court equity jurisdiction in such a case as this, and the bill does not state a case within the general equity powers of a court of chancery. As is stated in *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, "it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief."

The plaintiffs cannot maintain this bill, unless upon the ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of

trust, or any other ground of jurisdiction, which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs as creditors might by an attachment have obtained security which would take precedence of the contemplated lease; but if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown.

The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation.

*Decree dismissing the bill affirmed.*

*M. Williams & C. A. Williams*, for the plaintiffs.

*R. Olney*, for the defendant.

# CLEVELAND CITY FORGE IRON CO. v. TAYLOR BROS. IRON-WORKS CO.

1893. 54 *Federal Reporter*, 85.<sup>1</sup>

U. S. Circuit Court, Eastern District of Louisiana.

[The facts sufficiently appear in the opinion, delivered by Hon. EDWARD C. BILLINGS, U. S. District Judge, while sitting in the U. S. Circuit Court.]

*W. S. Parkerson, Denegre, Bayne & Denegre*, for plaintiffs.

*Thomas J. Semmes*, for defendants.

BILLINGS, District Judge. This cause is submitted on an application for an injunction pendente lite. The defendants are a corporation, limited, organized under the laws of Louisiana, and the stockholders therein. The complainants are plaintiffs in this court, who have commenced suit, two by attachment, and the other by sequestration. The chief object of the injunction sought is to restrain the stockholders from dissolving the corporation. Two points are involved in this application, and must be considered: First, has the corporation been already dissolved? and, second, if not, does the bill make a case for an injunction?

1. As to the claimed dissolution. [The Court held, that the corporation had not been legally dissolved.]

2. Does the bill make a case for injunction if the corporation exists?

<sup>1</sup> Only so much of opinion is given as relates to one point. — Ed.



The substance of the bill is that the complainants are creditors with attachment; that the defendants have made an attempt to dissolve the corporation, and, unless prevented by injunction, will dissolve, to the irreparable injury of the complainants. There is no charge of fraud or damage, save by previous gross mismanagement, and what will be accomplished by dissolution. Unless the institution of an attachment suit gives a creditor the right to thus interfere to prevent a dissolution of an indebted corporation, he has none; for the authorities seem to be to the effect that a mere creditor has no right to prevent. The solicitors for the complainant relied upon the case of *Fisk v. Railroad Co.*, 10 Blatchf. 518. A careful study of that case leads me to the conclusion that it is distinguishable upon principle from this. There the party obtaining the injunction had already instituted a suit in equity, averring waste of the assets of the corporation, for the purpose of winding up the entire business of the corporation and distributing all its effects. The attempt to dissolve was, therefore, a defiance of the entire purpose of the jurisdiction with which the circuit court was seised. Here there is simply a suit at law with an attachment, the force of which, as carrying any privilege, is dependent upon a judgment. It is a proceeding of individual creditors to secure and collect individual debts. The dissolution would defeat the creditors' object, but is in no sense a defiance of the court's jurisdiction; and, as it seems to me, after thoroughly considering the Case of *Fisk*, the protection of a previously acquired jurisdiction of a particular subject-matter, viz. the winding up of the affairs of a corporation, and the distribution of its assets from being supplanted, was the ground of the injunction there, which here is wanting. While in each case the object of the suit is defeated, and the dissolution is the medium of ushering in a final administration of the corporation's estate, in the *Fisk* Case that administration was the sole object of the suit, and was, so to speak, circumvented by the dissolution and consequent administration. The pending suit has a different object, — the collection of a debt, — and is only incidentally interrupted by a suit which, like bankruptcy or insolvency proceedings, absorbs, rather than circumvents, the object of the original suit. The *Fisk* Case is the only case which has been cited, or which I can find, which seems to sustain the injunction. I think that case inapplicable, and that, upon the doctrines of law, independent of that case, the creditors, who are complainants, upon the ground set forth in the bill, have no more right after an attachment suit has been commenced than they had before to enjoin a dissolution. The attaching creditors, by a dissolution of a defendant corporation, may lose all priority over the other creditors, but their right in equity to enforce their claim to their ratable portion to the corporation's assets by suitable proceedings, which is all that a court of equity can recognize with reference to a dissolution of the defendant corporation, would be left to them. The injunction is therefore refused.

## CHAPTER XI.

FORFEITURE OF CHARTER—HOW ENFORCED. SUIT BY  
STATE TO RESTRAIN *ULTRA VIRES* ACTS.

## HEARD v. TALBOT.

1856. 7 Gray, 113.<sup>1</sup>

COMPLAINT under Rev. Sts. c. 116, for flowing land by the water of Concord River, raised by the respondents' dam in the operation of their mills. Respondents claim the right to now maintain the dam without payment of damages, as the grantees of the corporation, styled the Proprietors of the Middlesex Canal. The corporation was chartered in 1793 to build a canal. In 1798 an additional act authorized the Proprietors to purchase and hold any mill seats on the waters connected with their canal, and to erect mills thereon. The charter provided that persons whose lands were flowed might obtain compensation by applying to the Court within one year from the time of the damage done. The Proprietors, so long as they were in active operation as a canal company, leased and sold water power to divers persons, to be drawn from the head of water raised by the Proprietors' dam, and to be used in subordination to the use of the water for feeding the canal. In 1826, the Proprietors built the present dam, by which the plaintiff's land is now flowed. In 1840, the plaintiff's ancestor applied to the Court to obtain compensation for flowage. The petition was dismissed; the Court holding that the damage was "done" when the dam was completed, and that no application could be made after one year from that time had elapsed. (*Heard v. Proprietors*, 5 Metcalf, 81.)

In 1851, the canal was wholly disused by the Proprietors, and filled up in parts of it; and it has now become wholly unfit for use, and is no longer filled with water, and is wholly unused by the Proprietors.

At the time of the abandonment of the use of their canal, and as a part of the winding up of their affairs, the Proprietors sold all their land and the residue of the water power by them unsold, raised by their dam aforesaid, to the respondents by deed of quitclaim, "subject expressly to the reservation of all easements and services necessary for or incident to the preservation and use of said canal for the purpose of

<sup>1</sup> Statement abridged. Argument omitted. — ED.

navigation, and of all the rights of the public therein, until the same shall be lawfully discontinued"; and the respondents have since that sale maintained and kept up the water by said dam for manufacturing purposes, and claim to use the same in such manner and to such extent as may suit their convenience for such manufacturing purposes, subject to said reserved right of said canal.

After abandoning the canal, and after the deed to the respondents, the Proprietors applied to the legislature for leave to wind up their affairs, and to sell their land and water power, and surrender their charter, which application was denied. Subsequently they petitioned the Supreme Court for leave to wind up their affairs and surrender their charter; which petition is still pending.

*B. F. Butler*, for plaintiff.

*J. G. Abbott*, for respondents.

BIGELOW, J. There can be no doubt, that the proprietors of the Middlesex Canal, under their original act of incorporation, *St. 1793, c. 21*, and under the additional act of 1798, *c. 16*, by which they were empowered to purchase and hold mill seats on the waters connected with their canal, acquired, as part of their franchise, the right to flow the land of the complainant; and that this right was in its nature a permanent easement or servitude, for which the complainant or those under whom he claims title had an ample remedy in damages provided in the third section of the original charter of the corporation. That remedy was an exclusive one, and the time within which parties could legally avail themselves of it has long since passed away. These points have already been adjudicated. *Stevens v. Middlesex Canal*, 12 Mass. 466. *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36. *Heard v. Middlesex Canal*, 5 Met. 81.

It seems to us very clear that there is nothing in the facts of the present case to take it out of the principles settled by those decisions, and that there is no ground on which the claim of the complainant to damages under the mill act can be sustained against these respondents. They hold their title to the mills and water power raised by the dam which causes the land of the complainant to be flowed, under a grant from the Proprietors of the Middlesex Canal. By the deed under which they claim, the right is expressly reserved to the grantors to appropriate the water raised by the dam at all times to the purpose of supplying their canal. It is therefore in the right of the canal corporation, and subject to this reservation, that the respondents claim to use and enjoy the mill privileges created by the dam which is the subject of this complaint. Unless, therefore, the corporation have surrendered or lost the right to keep up and maintain this dam, it having been already settled in 5 Met. 81, that the complainant has no claim for damages on account thereof against the corporation, it would seem to follow that he has none against these respondents, who claim under the corporation.

The sole ground on which he now rests his case is, that the canal

...the corporation have since the year 1851 wholly disused their canal, filled up portions of it, and suffered it to remain in such condition as to be entirely unfit for use. The argument is, that the right of erecting and maintaining a dam was granted to the corporation mainly for the purpose of enabling them to raise water for the supply of their canal, and the power to hold mills was wholly incidental to and dependent on the appropriation and use of the water raised by the dam for the great object for which the corporation was established and their franchise granted; that the corporation, having abandoned the use of the canal, and ceased to supply it with water, can no longer claim the right, under their charter, to maintain the dam.

Admitting, for the sake of giving full force to this argument, the correctness of the premises on which it rests, we do not think the conclusion drawn from them legitimately follows. An essential link in the chain of reasoning is wanting. The argument assumes that the neglect or omission to use a right granted to a corporation, as part of their franchise, for the specific purpose for which it was given, necessarily works a forfeiture of the right itself. But this is not so, unless the right is expressly made conditional on the use, which is not done in the act incorporating the proprietors of the canal. The right is given absolutely, and without express condition or limitation. The corporation are still in existence. All the rights and powers conferred on them by law, and comprehended within the broad terms of their franchise, have never yet been legally forfeited or extinguished. Nor can they be, except by a surrender of the charter and its acceptance by the government, or by a forfeiture declared by the judgment of a competent tribunal, or by proceedings under *St. 1852, c. 55*.

In the absence of express conditions in an act of incorporation, by which corporate rights and powers are made to depend on their due exercise, a nonuser or misuser of them does not operate as a surrender or forfeiture of the charter. Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and, upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derive their powers. Individuals therefore cannot take it upon themselves in the assertion of private rights, to insist on breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a cor-

porate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would not only be a great anomaly to allow persons, not parties to a contract, to insist on its breach and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person, who might be aggrieved by their exercise. Therefore it has been often held, that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government. *Angell & Ames on Corp.* § 777, and cases cited. *Boston Glass Manufactory v. Langdon*, 24 Pick. 49. *Quincy Canal v. Newcomb*, 7 Met. 276.

It follows from these principles, that the franchise of the Proprietors of the Middlesex Canal, which includes the right of keeping up and maintaining the dam which flows the land of the complainant, being still in existence, it is not competent for him in this proceeding to show a nonuser or abandonment of the canal, as a ground for denying the right of the corporation to continue the dam; and as the respondents hold their title under the corporation, and justify the flowing of the complainant's land under the corporate franchise, there is no ground for sustaining the present complaint under the mill act against the respondents. It is a sufficient answer to this suit, that the corporation have the legal right to maintain the dam as against the complainant, without payment of damages.

This view of the case renders it unnecessary to determine the question discussed at the bar, whether the right to purchase and hold mills, which was conferred on the corporation by the act of 1798, was the grant of an additional and distinct franchise or right, which may be used and enjoyed by the corporation or their grantees separately from and independently of the building and maintaining of a canal; or whether it was merely secondary and subordinate to the making of a canal and the raising of water for its supply, and was to cease and become extinguished when the right of keeping and using the canal should be surrendered or forfeited. Nor have we occasion to decide whether the forfeiture or extinguishment of the charter of the corporation would operate to defeat the title of the grantees of the corporation to the mills and water power which had been acquired by the corporation lawfully, and conveyed to the respondents by deeds valid at the time they were made, by which the title became vested before such extinguishment or forfeiture took place. These are important and interesting questions; but it will be quite time enough to settle them, when the exigency of a case shall require, in order to adjudicate upon the rights of parties, that they should be judicially determined.

*Complainant nonsuit.*

## WALLAMET, &amp;c. CO. v. KITTRIDGE.

1877. 5 *Sawyer* (U. S. Circuit Court), 44.<sup>1</sup>

U. S. Circuit Court. District of Oregon. Before DEADY, DISTRICT JUDGE.

Action upon a bond, conditioned for the performance of a contract.

Defendants, among other defenses, pleaded:—

2. That on May 1, 1876, the plaintiff ceased to carry on the business for which it was formed, and has not since transacted or carried on any of such business, and has ceased to exist.

Plaintiff demurred.

The above plea is founded on section 16 of the corporation act (Oregon Laws, p. 528), which provides that if any corporation organized thereunder, “shall for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease.”

*William Strong*, for plaintiff.

*Charles B. Upton*, for defendant.

DEADY, J. [After stating the case.] It is admitted by counsel for the defendant that a forfeiture of the plaintiff's corporate powers cannot be set up to defeat this action. But it is claimed that the non-existence of a corporation may always be pleaded to an action professed to be brought by it; as that it was never duly created or had ceased to exist by lapse of time; and that under the provision cited from section 16, *supra*, whenever a corporation neglects to use its powers for any one period of six months it ceases to exist, the same as if its corporate life had then expired by lapse of time.

But in my judgment the language — “its corporate powers shall cease,” is the substantial equivalent of the phrase “its corporate powers shall be forfeited.” In either case the statute does not execute itself. An inquiry must be made to ascertain whether the corporation has kept the conditions subsequent upon which its creation was authorized and permitted. (If there has been a failure to keep any such condition no one can allege it or take advantage of it but the State which created or authorized the corporation. In this respect a corporation is like an estate in fee. If a condition subsequent is annexed to such an estate, no one but the grantor or his successors can take advantage of its non-performance. (*Schulenberg v. Harriman*, 21 Wall. 63.) Upon the question of whether the words — “its corporate powers shall cease,” import a forfeiture of the corporate existence rather than an actual termination of the same, as by lapse of time, the case of *Lessee of Frost et al. v. Frostburg Coal Co.*, 24 How. 283, is in point. There the law provided that in case four fifths of the capital

<sup>1</sup> Statement abridged. Only so much of case is given as relates to one point. — ED.

stock of a corporation became concentrated in the hands of less than five persons "the corporate powers and privileges shall cease and determine," and it appearing that the stock of the corporation defendant was so owned, the court held that it was a cause of forfeiture of which a private party could not take advantage; saying, "That is a question for the sovereign power, which may waive it or enforce it at its pleasure." In *Chesapeake etc. Canal Co. v. Ohio R. Co.*, 4 Gill & John. 1, it was held that a violation of a provision in a charter of a corporation, to the effect that on a breach of a certain condition such corporation should not be entitled to any privilege under the act of incorporation, and that all its interest thereunder should be forfeited and cease, did not *ipso facto* work a dissolution of the corporation. See, also, to the same effect, *The People v. The Manhattan Bank*, 9 Wend. 382; *Bradt v. Benedict* [17 New York] 93; *Mickles v. Rochester Bank*, 11 Paige, 118. That this provision in section 16, *supra*, concerning the non-user of corporate powers, is a condition subsequent and not a limitation upon the existence of the corporation, is further shown by the Code of Civ. Pro., which provides (sec. 353, sub. 4) that an action may be maintained in the name of the state "for the purpose of avoiding the charter or annulling the existence of such corporation, . . . whenever it has forfeited its privileges or franchises, by failure to exercise its powers."

Here, the state has provided a direct judicial proceeding to annul the existence of a corporation which has failed to exercise its powers for such a period and under such circumstances as causes a forfeiture of its privileges — the very case described in section 16, *supra*. Indeed, this declaration of the statute is simply intended to define and make certain what kind and duration of neglect or non user of the corporate powers shall be a sufficient cause of their forfeiture. Without the statute the question in each case was involved in the uncertainty of determining whether, under all the circumstances, the neglect was wilful and material. (A. & A. on Cor. 776.) But now the statute furnishes a certain and prescribed rule. A neglect to exercise the powers of the corporation for six months works a forfeiture without reference to the cause or consequence of such neglect. But this action can only be brought in the name of the state and upon leave granted by the judge of the court. Neither the forfeiture nor the fact of non-user can be set up by a private person for any purpose. It must first be judicially ascertained and declared on the complaint of the state. (A. & A. on Cor., sec. 777.) The demurrer to this defense is sustained.

[Remainder of opinion omitted.]

BELCHER, J., IN OAKLAND R. CO. v. OAKLAND, BROOKLYN  
&c. R. CO.1873. 45 *California*, 365, pp. 373, 374, 378.

Conceding that the plaintiff's grant was upon condition subsequent, still it does not follow that its right in that part of the street where it had not constructed a road could be determined only by a judgment of forfeiture.

The grant was of a franchise, which had the legal character of an estate or property. "An estate," said Chancellor KENT, "in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for an adequate consideration." 3 Kent's Com. 458.

Now, while a forfeiture at common law does not operate to divest the title of the owner until by a proper judgment in a suit instituted for that purpose the rights of the State have been established, it is otherwise when the forfeiture is declared by a statute. In the latter case the title to the thing forfeited immediately vests in the State upon the commission of the offense or the happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name. The authorities to this effect are numerous and uniform.

"It has been proved," said MARSHALL, C. J., "that in all forfeitures accruing at common law nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction taken by the counsel for the United States between forfeitures at common law and those accruing under a statute is certainly a sound one. When a forfeiture is given by a statute the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the legislature. *United States v. Grundy*, 3 Cranch, 151."

In this case it is clear that the legislature intended, by the restriction as to the time within which the plaintiff's work must be completed, that it should have no rights in the streets of Oakland if it failed to exercise them within five years. This intention was expressed in the most explicit terms, for, as we have seen, it declared that upon failure to comply with the provisions of the act, "then the franchise and privileges herein granted shall utterly cease and be forfeited." Not to give effect to this declaration would be to frustrate and defeat the legislative will.



## BROOKLYN STEAM TRANSIT CO. v. CITY OF BROOKLYN.

1879. 78 *New York*, 524.<sup>1</sup>

APPEAL from judgment in favor of defendant, rendered by General Term in the Second Department.

The action was brought by plaintiff, Aug. 31, 1878, to restrain defendant from interfering with the construction of its road in defendant's streets.

Plaintiff was incorporated by Chapter 940, Laws of 1871. Section 17 provides as follows: "This act shall take effect sixty days after the passage thereof; but unless said Brooklyn Steam Transit Company be organized, and at least one mile of such railroad, as it is authorized and empowered to construct under this act, be laid within three years thereafter, then and in that case this act and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated."

Under that act plaintiff was in some way organized. By a subsequent act of 1873, the time for the construction of the one mile of railroad was extended to July 4, 1876. The plaintiff did not build or lay any portion of its railroad until June, 1878, when it built a mile outside the city of Brooklyn, and commenced to lay foundations for a railroad within the city limits.

*David Dudley Field*, for appellant.

*William C. De Witt*, for respondent.

EARL, J. [After stating the case.] The claim of the defendant is that the plaintiff lost its corporate existence by not building one mile of its road before the expiration of the time limited, to wit, July 4, 1876.

The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter or to comply with its provisions (does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney-general in behalf of the people; but it cannot be denied that the Legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the Legislature has intended so to provide in any case depends upon the construction of the language used. Here the language used shows that the Legislature intended to make the continued existence of the plaintiff as a corporation depend upon its compliance with the requirements of section seventeen of the original act. In case of non-compli-

<sup>1</sup> Statement rewritten. Arguments and part of opinion omitted. — Ed.

ance the act itself was to cease to have any operation, and all the powers, rights and franchises thereby granted were to be "deemed forfeited and terminated." There was to be not merely a cause of forfeiture which could be enforced in an action instituted by the attorney-general, but the powers, rights and franchises were to be taken and treated as forfeited and terminated. At the end of the time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence. A precise authority for this construction of this statute is found in the case of the *Brooklyn, Winfield and Newton Railroad Company* (72 N. Y. 245). That company was organized under the general railroad act of 1850, as amended by the act, chapter 775 of the Law of 1867. By the last named act it is provided that "if any corporation formed under the general act shall not, within five years after its articles of association are filed and recorded, begin the construction of its road and expend thereon ten per cent on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease." That company had not begun the construction of its road within the time limited, and it was held that it had lost its corporate existence, and the same view was emphatically reiterated when a similar case of the same company was again before this court (75 N. Y. 335). It was held that the statute executed itself, and that the intervention of the courts in an action instituted by the attorney-general was not necessary. The language of limitation used in section seventeen of the act of 1871, more plainly, if possible, indicates the legislative intention, that a failure to comply with the limitations should put an absolute end to the corporation, than the language used in the act of 1867.

An effort was made upon the argument of this case by the learned counsel for the appellant to distinguish this case from the one cited, but we can perceive no material difference between the two cases. In that case the company was fully organized, as it was in this. That company had a corporate existence to lose, and so had this. It is probably true, that this company in making surveys and plans within the three years may have done more than that company did, but that is immaterial, so long as it failed to do the precise thing required by the statute. In that case the proceeding was to interfere with private property by the right of eminent domain. Here this company was proceeding to occupy the public streets which were under the charge and control of the city. In the one case, as in the other, corporate existence and right were necessary to justify the act. The city must have as much right to question this use of its streets as a private owner would to question the use of his property. If a private owner could in such case question the corporate existence of the company, the city must have the same right. The fact that that company was organized under a general law, while this is organized under a special law, can make

no difference. A corporation organized under a general law is upon precisely the same footing as one constitutionally organized under a special law which contains all the provisions of the general law. Nor can the fact that this company has already built one mile of its road distinguish this case from the one cited. If we are right thus far, it built that line without any authority, and it did not acquire thereby the right to enter the city and continue its wrongful acts there. But it is not necessary to determine in this case what the status of the plaintiff would have been if it had been operating its road upon the mile thus constructed. It is sufficient now to determine that it cannot wage an aggressive warfare either upon private property or the public streets of the city of Brooklyn without further or other legislative authority than it invoked upon the trial of this action.

[Remainder of opinion omitted.]

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NEW YORK & LONG ISLAND BRIDGE CO. v. SMITH.

1896. 148 *New York*, 540.<sup>1</sup>

CONDEMNATION PROCEEDING. An order appointing commissioners of appraisal was affirmed by the General Term in the First Department. The defendant Smith appealed.

*De Lancey Nicoll*, for appellant.

*Julien T. Davies*, and *William J. Kelly*, for respondent.

BARTLETT, J. The main question presented by this appeal is whether the New York and Long Island Bridge Company was, at the time this proceeding was instituted, an existing corporation duly authorized to acquire title to the land of the defendant Smith, for the purposes of constructing the bridge and its approaches.

The learned counsel for the appellant rests his attack upon the corporate existence on various distinct grounds, and a proper consideration of them involves a full examination of the legislation under which the bridge company claims the right to maintain this proceeding.

The appellant takes a preliminary point which, if sound, would require a reversal of the order appealed from, and a dismissal of this proceeding.

The act incorporating the bridge company (Chap. 395, Laws of 1867), provides in the twelfth section thereof that the bridge shall be commenced within two years from the passage of the act, and shall be continued without unreasonable delay, until it is completed, "or this act and all rights and privileges granted hereby shall be null and void."

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to one point. — Ed.

It is the contention of appellant's counsel that this forfeiture clause is self-executing, and as it is admitted that the work was not commenced within two years from the passage of the act, the bridge company, *ipso facto*, ceased to exist.

We are referred to a large number of authorities as sustaining this position, and, among others, to several cases in this court.

It is to be observed that the question as to whether a forfeiture clause is or is not self-executing, depends wholly upon the language employed by the legislature.

Our attention is called particularly to *In re Brooklyn, Winfield & Newtown Ry. Co.* (72 N. Y. 245) and *Brooklyn Steam Transit Co. v. City of Brooklyn* (78 N. Y. 524).

In the first case the words of forfeiture were, "its corporate existence and powers shall cease," and this court held that upon default the corporation's existence and powers ceased, without judicial proceedings. In the second case the words of forfeiture were, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated," and this court held the clause to be self-executing, thereby recognizing the undoubted power of the legislature to provide that corporate existence shall cease by the mere fact of failure of the corporation to perform certain acts imposed by the charter.

It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney-general.

In the case at bar the words of forfeiture are, "all rights and privileges granted hereby shall be null and void."

It cannot be said that the words "shall be null and void" disclose the legislative intent to make this clause self-executing. The words "null and void," as used in this connection, clearly mean voidable. The word "void" is often used in an unlimited sense, implying an act of no effect, a nullity *ab initio* (*Inskeep v. Lecony*, 1 N. J. L. 112); in the case at bar it was not so employed, but rather in its more limited meaning.

We think these words mean no more than if the legislature had said, in case of default the corporation "shall be dissolved." The attorney-general was authorized to treat the charter of the bridge company as voidable, and by appropriate legal proceedings to have terminated its corporate existence.

The Supreme Court of the United States, in passing upon the meaning of the words "void and of no effect," uses this language:—"But these words are often used in statutes and legal documents, . . . in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. (*Exell v. Daggs*, 108 U. S. 148.)"

Holding, as we do, that the forfeiture clause in the act of 1867 was not self-executing, we find in the various acts amending the act of 1867 repeated waivers by the legislature of the failure of the bridge company to begin its work within two years from the passage of the act of 1867.

[The learned Judge then referred to acts of 1871, 1879, 1885, and 1892.]

[Opinion on other points omitted.]

*Order affirmed.*

## COMMONWEALTH v. UNION, &c. INS. CO.

1809. 5 Mass. 230.<sup>1</sup>

THIS was a motion for a rule upon the defendants to shew cause why the *Solicitor General* should not be directed to file an information in the nature of a *quo warranto* against them, that the said company might be dissolved, and their corporate powers be adjudged void. The motion was made by *Sullivan* in behalf of seventeen persons alleging themselves to be members of the corporation, . . .

*Jackson*, for defendants.

*The Solicitor General*, for the relators (but not appearing in his official character).

PARSONS, C. J.

Informations of this nature are properly grantable for the purpose of enquiring into the election or admission of an officer or member of a corporation, when moved for by any person interested in, or injured by such election or admission, if the same was unduly made. And upon such information, if the election or admission was illegal, judgment of a motion might be entered, and a fine might also be imposed on the party who had usurped upon the commonwealth.

In this case the parties applying for the rule do not complain of any illegal election or admission, of any officer or member of the corporation: but the object of the application is to obtain a judgment of forfeiture of the franchises of the corporation, and a seizure of them by the commonwealth.

We are well satisfied that a corporation, as well when created by charter under the seal of the commonwealth, as by a statute of the legislature, may by nonfeazance or malfeazance forfeit its franchises, and that by judgment on an information the commonwealth may seize them. And if the allegations stated in the motion for the rule in this case were true, and the commonwealth had caused an information to

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

be filed and prosecuted, for the purpose of seizing the corporate franchises for such malfeazance, judgment for those causes might have been rendered for the commonwealth.

But an information for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the commonwealth, to be exercised by the legislature, or by the attorney or solicitor general, acting under its direction, or *ex officio* in its behalf. For the commonwealth may waive any breaches of any condition expressed or implied, on which the corporation was created; and we cannot give judgment for the seizure by the commonwealth of the franchises of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment.

This distinction between informations in the nature of a *quo warranto*, to impeach any election or admission of a corporate officer or member, and informations to dissolve a corporation is well settled, and upon sound principles of law.<sup>1</sup>

*Rule discharged.*

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## STATE v. FOURTH N. H. TURNPIKE.

1844. 15 *New Hampshire*, 162.<sup>2</sup>

INFORMATION in the nature of *quo warranto*, filed by the Attorney General against the defendants, and charging them with usurping the privilege and franchise of maintaining a toll gate and demanding and receiving tolls.

The case came before the Court upon the state's demurrer to the defendants' rejoinder. Upon the pleadings the following facts appeared:

The defendants were incorporated in 1800, with power to maintain a turnpike road and collect tolls. Soon after incorporation, they built the road and established toll gates. The charter enacts, that, at the end of every six years after the setting up of any toll gate, an account of the expenditures and profits of the road shall be laid before the legislature, under forfeiture of the privileges of said act in future. No accounts were furnished until 1830. In 1830, 1836, and 1842, accounts were laid before the legislature, and were received by the legislature as sufficient and satisfactory. In 1833 an act was passed authorizing defendants to change the route of the road in certain towns. The defendants accepted this act, and changed the route at great expense.

*Perley*, for defendants.

*Walker*, Attorney General, for state.

GILCHRIST, J. The charter makes it the duty of the corporation to lay before the legislature, at the end of every six years after the setting

<sup>1</sup> *Rex v. Corporation of Carmarthen*, 2 Burr. 869.

<sup>2</sup> Statement abridged. Argument omitted. — ED.

up of any toll-gate, an account of the expenditures and profits of the road, under the penalty of forfeiting the privileges of the act in future. These accounts, however, were not submitted until the years 1830, 1836 and 1842, in which years they were submitted to the legislature, and accepted by them as sufficient and satisfactory. In the year 1833 the legislature passed an act authorizing the corporation to change the route of their road in certain places. These are the facts laid before us, upon which we are to determine whether the defendants are now an existing corporation.

The accounts not having been laid before the legislature, the penalty of forfeiture was incurred in terms. But the subsequent accounts were accepted by the legislature as sufficient and satisfactory, and farther powers were conferred upon the defendants by the act of 1833. Has the legislature power to waive the forfeiture? And if it has, do these facts amount to such waiver? These are the questions presented to us by the pleadings.

The doctrine of the waiver of a forfeiture by the legislature by subsequent legislative acts does not apply, if, by the terms of the charter, the franchise absolutely determines on failure to perform the condition; for as in such case the corporation has ceased to exist, the doctrine of waiver is inapplicable. The charter in this case provides that the accounts shall be laid before the legislature, "under forfeiture of the privileges of the act in future." The meaning of this is, that the forfeiture shall be proved in the regular, legal manner; upon the institution and prosecution of proceedings in the established course, such neglect of this duty shall be cause of forfeiture. It probably would not be competent for a debtor of the corporation, when sued, to set up by way of defence that the charter of the corporation was forfeited, unless the forfeiture had been established by the judgment of this court. *Chester Glass Co. vs. Dewey*, 16 *Mass.* 102; *Bank of Niagara vs. Johnson*, 8 *Wend.* 645; *The People vs. The Manhattan Co.*, 9 *Wend.* 382. That is a matter to be judicially tried and determined, and not to be inquired into collaterally. Where a charter imposes the duty of making stated returns of the expenditures and profits, the government alone can enforce a forfeiture for a neglect of the duty. *Peirce vs. Somersworth*, 10 *N. H. Rep.* 369; *The State vs. Carr*, 5 *N. H. Rep.* 367. In the case of the *Bear Camp River Co. vs. Woodman*, 2 *Greenl.* 404, the charter was to become void, if, at the end of one year, the river should not be cleared of certain obstructions. In an action of assumpsit to recover tolls of the defendant, he offered to prove that the removal of the obstructions had never been effected; but the evidence was rejected at the trial, and the ruling was held to be correct. This case affords a strong illustration of the necessity of specific judicial proceedings for the purpose of causing the charter to be declared forfeited. And in the case before us, we think that by the omission to lay the accounts before the legislature, the corporation did not, *ipso facto*, cease to exist, but proceedings must have been instituted, to

establish the fact that the penalty of forfeiture was incurred. *Rea vs. Pasmore*, 3 T. R. 244. A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but, from some defect in their constitution, cannot legally exercise the powers they affect to use. *Ashhurst, J.* Chancellor *Kent* says that he believes there is no instance of calling in question the right of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. *Slee vs. Boom*, 5 Johns. Ch. 381. In *The People vs. The Manhattan Co.*, 9 Wend. 382, Mr. Justice *Sutherland* says, "where the corporation expires by lapse of time, it may be otherwise, and in such case only." A corporation may forfeit its franchises for misfeasance or nonfeasance, but the information for that purpose must be presented under the authority of the State, which must be a party to the suit and a party to the judgment for the seizure of the franchise. *The Commonwealth vs. Union Ins. Co.*, 5 Mass. 230; *Rea vs. Amery*, 2 T. R. 515; *Vernon Society vs. Hills*, 6 Cowen, 23.

The corporation, then, being in existence in the year 1830, did the reception of the accounts and the passage of the act of 1833 constitute a waiver of the preëxisting ground of forfeiture, so that it cannot now be insisted on? It is said expressly, by *Parsons, C. J.*, in *The Commonwealth vs. Union Ins. Co.*, 5 Mass. 232, that the commonwealth may waive any breaches of any condition, expressed or implied, on which the corporation was created. The surrender of a charter can be made only by some solemn, formal act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. *Morton, J.*, *Boston Glass Man. vs. Langdon*, 24 Pick. 53. If acts of the legislature recognize the subsequent and continued existence of the corporation, such recognition will be a waiver of a forfeiture. *The People vs. The Manhattan Co.* In the case of *The People vs. The Kingstown Turnpike Co.*, 23 Wend. 193, it was held, that an act extending the time for the completion of the road was not a waiver of breaches of conditions; for such was not expressly declared to be the intent of the legislature, nor was the intent necessarily to be implied from the act. From this position Mr. Justice *Cowen* dissented, and held that a statute expressly giving time to complete the road was equivalent to a renewal or confirmation of the original charter.

In the present case, the legislature did not expressly declare that they recognized the corporation as in existence, or confirmed its privileges, but we think no other construction can be given to their proceedings. It is a reasonable doctrine, that a breach of condition may be waived. It is an important element in the law relating to landlord and tenant. In *Goodright vs. Davids*, Cowp. 803, Lord *Mansfield* observed that forfeitures are not favored in law, and where the forfeiture is once waived the court will not assist it. *Coon vs. Brickett*, 2 N. H. Rep. 163; *Doe vs. Pritchard*, 5 B. & A. 765. There is as much



reason for considering the acts of a legislative body as a waiver of a forfeiture, as there is for giving that effect to the act of a landlord. The State can claim no exemption from the ordinary rules which govern contracts, and there is not to be one law for them and another for private persons. The legislature accepted the accounts laid before them in 1830, and the subsequent years, as sufficient and satisfactory; that is, they were satisfied with the accounts as a sufficient compliance with the charter. The act of 1833 is an equally clear waiver of a forfeiture. Notwithstanding what had occurred, they authorized the corporation to alter the route of their road. The act is susceptible of no other construction in this regard, than that the legislature intended to waive any forfeiture consequent on the prior omissions of the corporation. If they had intended to insist on any forfeiture, the act certainly would not have been made. The act was intended to be beneficial to the corporation. But it would not have been so unless they retained the other corporate powers necessary to enable them to carry into effect the purposes of the act. We are, therefore, of opinion that the rejoinder is a sufficient answer to the replication, and that upon the demurrer there must be

*Judgment for the defendants.*

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### PEOPLE v. PHENIX BANK.

1840. 24 *Wendell* (New York), 431.<sup>1</sup>

INFORMATION in the nature of a *quo warranto* against the defendants for claiming to be and acting as a corporation. The case came before the Court upon a demurrer to the defendants' rejoinder; which alleged that the Governor and Senate had appointed a State Director of the Bank after the defendants committed the acts which the State relied on as cause of forfeiture.

*S. A. Foote* and *Willis Hall* (Attorney General), for the People.

*D. Lord, Jr.*, and *J. Prescott Hall*, for defendants.

BRONSON, J. No question has been made upon the sufficiency of the replications. The case, then, comes to this: the attorney general alleges that the defendants have forfeited their corporate privileges by taking usury. The defendants answer, that a state director has since been appointed by the governor and senate; and this act, they insist, amounts to a waiver or pardon of the forfeiture. The conclusion does not follow from the premises.

No one could take advantage of the forfeiture in a collateral manner. It could only be asserted by a direct legal proceeding on the part of the government to dissolve the corporation. Notwithstanding the

<sup>1</sup> Statement abridged. — Ed.

existing cause of forfeiture, the defendants were a corporation *de facto*, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the mean time, it was the duty of the governor and senate, as well as all others, to treat the defendants as a legally existing corporation. The appointment of a state director was, therefore perfectly consistent with the intention to continue this prosecution, and insist on the forfeiture.

Should it be conceded that the governor and senate had a dispensing power it does not appear that the power has been exercised. // We are not authorized to follow the suggestion of the defendants' counsel, and assume that the appointment was made for the purpose of waiving the forfeiture. // There is no such allegation in the rejoinder; and besides, we cannot shut our eyes to the fact that there was another and a sufficient ground for the exercise of the appointing power. Indeed, if the public officers believed that the defendants had violated their charter, they had a cogent reason for making the appointment, to the end that there might be one director in the board to watch over the public interests until the forfeiture could be asserted, and the corporation dissolved in the forms prescribed by law.

Enough has been said to dispose of this case. But I must not be understood as admitting that the governor and senate, without the concurrence also of the assembly, had any dispensing power. They had no more authority to waive or pardon the forfeiture than any other public officer or body of men. Indeed, the attorney general had more power over this matter than the governor and senate united; for if he refused to prosecute, the wrong charged upon the defendants would go unpunished, and the corporation would continue to exist and enjoy its privileges in the same manner as though there had been no violation of the charter. Still, the neglect to prosecute would not amount to a pardon; it could only operate as a waiver so long as the omission continued, and would be no answer to a *quo warranto* whenever he, or his successor in office, might choose to insist on the penalty.

In England, where corporations may be created by royal charter, the king can pardon a forfeiture, by granting restitution; but he has, I think, no such power in relation to corporations created by act of parliament. *The King v. Amery*, 2 T. R. 568, 9. *Newling v. Francis*, 3 id. 189. *The King v. Miller*, 6 id. 277. So here, where corporations are created by the legislature, that body can waive the forfeiture, by ratifying and confirming the original grant. *The People v. The Manhattan Company*, 9 Wendell, 351. But no other body of men has any such dispensing power. The franchise is granted upon condition that it shall become void in case of misuser; and although the corporation will continue to exist until the forfeiture is asserted in the forms prescribed by law, the condition can only be changed, or the penalty released, by the power which made the original grant. The legislature may, perhaps, delegate its authority to pardon the offence; but that has not been done.

The rejoinder does not show that any act has been done which is inconsistent with the assertion of the forfeiture; and if it were otherwise, the governor and senate, without the concurrence of the assembly, had no dispensing power.

*Judgment for the people.*

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STATE v. OBERLIN BUILDING AND LOAN ASSOCIATION.

1879. 35 Ohio State, 258.<sup>1</sup>

QUO WARRANTO. Information filed by the Attorney General, on the relation of Colburn, praying for a judgment of ouster against the defendant corporation. Colburn is a member of the corporation, and was formerly a director. The case was heard on the pleadings, an agreed statement of facts, and certain testimony.

*Isaiah Pillars*, Attorney General, and *N. L. Johnson*, for plaintiff.

*I. A. Webster*, and *Geo. K. Nash*, for defendant.

OKEY, J. [After quoting various sections of the act under which the corporation was organized, and stating certain facts as to the conduct of the corporation.]

On this state of facts our conclusions are as follows:—

1. That the association has abused its corporate powers in several particulars, admits of no doubt. It has refused to loan its funds to its members, and it has established such rules and regulations, and so conducted its business by dividing its funds and otherwise, as to prevent the loan of its funds to a member, under the system of competitive bidding contemplated in the statute, and provided for in the by-laws of the company. It has, indeed, loaned its funds, in many instances, to persons who were not members of the association. The illegality of such a course is clearly stated in *State ex rel. v. Greenville Building and Saving Association*, 29 Ohio St. 92.

Again, the association has been in the habit of borrowing money for the purpose of lending it. We do not deny that corporations possess the power to borrow money which may be needed in the transaction of their necessary business; but these transactions fall within no such principle. The money to be loaned by associations like this if, as here, deposits are not received, can only be properly accumulated in the manner contemplated by the statute, that is by dues, fines, premiums, and interest; and the acts complained of, and fully proved by the testimony, cannot be readily distinguished from the business of a banker. They are clearly illegal.

Equally illegal was the act of dividing the money and securities among certain stockholders. It was opposed to the principle upon

<sup>1</sup> Statement abridged. Part of opinion omitted.—Ed.

which such associations are organized. It was, indeed, even if it had been done with perfect impartiality, a plain violation of the statute, which contemplates that no such division shall be made until "said shares are fully paid."

Finally, it was illegal for the association to traffic in shares of its own stock. We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purpose; but here the association purchased its own shares of stock, in several instances, for the purpose of disposing of them to persons not intending to become members of the association, with a view of making such shares the basis of loans to such persons. The law will not uphold such transactions.

2. The association compromised with several of its members, and released them from further obligation to the corporation, as well on account of indebtedness for loans, as on subscription. We have examined the evidence, and we do not find there was any want of good faith in these transactions. The interest of the stockholders as well as the public, seems to have been kept in view. Of course, without this such acts could not be upheld; but we are not able to find in the statute any inhibition of the power to make such compromises, and, on the fullest consideration, we unite in holding that the power exists.

3. Where a corporation has been guilty of acts which, by statute, are made a cause of forfeiture of its franchise to be a corporation, this court has no discretion to refuse such judgment. *State ex rel. v. Penn. & O. Canal Co.*, 23 Ohio St. 121. But, in other cases, we are vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed. With some hesitation, a majority of the court have reached the conclusion that it will be for the interest of the stockholders, as well as the public, that we should render the latter instead of the former judgment. The evidence satisfies us that if the corporation is permitted to wind up its affairs, the work will be accomplished in a few months; but if the association should be ousted from its franchise to be a corporation, we would be required to appoint trustees under the act of 1878 (75 Ohio L. 817, 22; Rev. Stats. 6781), and this would occasion delay and involve increased expense. Accordingly, the corporation will be ousted from the exercise of its powers referred to in the first paragraph of the syllabus, and from the power of permitting any member to hold in his own right more than twenty shares of stock, but not from its franchise to be a corporation, nor from the exercise of the power referred to in the second paragraph of the syllabus.

GILMORE, C. J. I dissent only as to the judgment entered. Such flagrant and persistent violations of corporate powers and duties as are shown in this case, in my opinion, call for and require an application of the severest penalties of the law. The judgment should oust the defendant from being a corporation.

*Judgment of ouster as to specified powers.*

PEOPLE EX REL. ATTORNEY GENERAL v. KANKAKEE  
RIVER IMPROVEMENT CO.1882. 103 *Illinois*, 491.<sup>1</sup>

INFORMATION in the nature of a *quo warranto*; alleging that defendant, without any warrant, was exercising the power of controlling the navigation of the Kankakee and Iroquois Rivers, and collecting tolls, and requiring the company to show cause by what warrant it claimed to exercise such powers.

To this information the defendant filed a plea, which was demurred to. The Circuit Court overruled the demurrer, and gave judgment for defendant, dismissing the information. Plaintiff appealed.

The facts set out in the plea were in part as follows:—

In 1847, an act was passed incorporating the Kankakee and Iroquois Navigation Company, with power to improve the navigation of both rivers from certain points up to the Indiana State line. No time was prescribed for completing any part of the improvements. Prior to 1865 improvements on a part of the Kankakee river had been made and used. In 1865 an amendatory act was passed, and was accepted by the corporation. Section 6 of this act provides that “said company shall lock and slack-water said Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years from the passage of this act, . . .” The plea admits that the improvement from Kankakee City to the east line of the State of Illinois has not been commenced, and is no longer in contemplation by the defendant. The defendant corporation was formed about 1879 by persons who had purchased at a mortgage foreclosure sale the franchise, improvement, and real estate of the original corporation.

*James McCartney*, Attorney General, for the people.

*G. D. A. Parks*, for appellee.

SHELDON, J.

We can see here but one entire franchise for the improvement of these streams, and that this obligation to make the improvement above Kankakee City was a condition annexed to this entire franchise. And we can not admit the idea, so ably and ingeniously pressed upon us, of the divisibility of the franchise, that there became a separate, independent franchise as to the completed portion of the improvement below Wilmington, and a like one as to the portion of the improvement above Kankakee City, to which latter only the condition was annexed, and that it was the franchise as to this last named portion of the improvement only which was forfeitable for breach of the condition. We think the non-compliance with the requirement in question was cause of for-

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

feiture of the entire franchise. An abuse in a particular department of an entire franchise is cause of forfeiture of the whole franchise. Angell & Ames on Corp. sec. 776.

The hardship upon the company of enforcing a forfeiture is urged as a reason against applying this remedy. This is the common argument addressed to courts in these cases, and the answer they make is, that the appeal is made to the wrong forum, — that this is a question for the legislature that prescribed the requirements of the charter. The courts have no dispensing power; that the only questions for a court in such cases are, is the act required, and has it been performed. Yielding to such considerations of hardships would be a doing away with the established legal remedy of forfeiture for the breach of conditions annexed to estates. Inconvenience is the necessary result of the application of such a remedy. It is held to be most important to the public interest that the grantees of public franchises should be held to a faithful performance of the obligations which they assume, and to secure this, courts must administer the prescribed remedy in case of failure.

Lastly, the court is invoked to exercise its discretionary power under the statute, and only assess a fine, the statute providing that instead of judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, a fine may be assessed instead. Had there been but the omission of some duty of minor importance, the alternative of a fine might properly be considered; but the non-performance here is of a thing which is of the essence of the contract, — it goes to the object of the incorporation, not doing the very thing the performance of which was the purpose and object for which the company was instituted. It is failure by the corporation to act up to the end of its creation. The demand of public good is nothing less than that there should be a resumption by the State of the corporate franchise of which there has been such misuser, — that the company should be made to give way, so as to afford opportunity, through some other instrumentality, for the accomplishment of this work of public advantage, the improvement of the navigation of these two rivers, or at least of the Kankakee, to the Indiana State line.

Being of opinion the demurrer to the plea should have been sustained, the judgment of the Circuit Court is reversed and the cause remanded.

*Judgment reversed.*

## 3

## WHEELER v. PULLMAN IRON &amp; STEEL CO.

1892. 143 *Illinois*, 197.<sup>1</sup>

BILL IN EQUITY by two stockholders in the Pullman Iron & Steel Co. against said company and certain other defendants; praying (*inter alia*) that the corporation be dissolved and its business closed up; that a receiver be appointed; and that an accounting be had between the parties growing out of matters stated in the bill. A demurrer to the bill was sustained and the bill dismissed. On appeal to the Appellate Court this decree was affirmed. Plaintiffs now prosecute this further appeal.

*Ullman & Hacker*, for appellants.

*John S. Runnells*, and *William Burry*, for appellees.

SHOPE, J. Without pausing to consider the ground of objection that the bill is multifarious, we are of opinion that the demurrer thereto was, on other grounds, properly sustained, and complainants electing to stand by their bill, it was properly dismissed.

It is insisted that the bill may be maintained upon either of two grounds: First, as a bill to dissolve the corporation, wind up its affairs, and distribute its assets; and second, as a bill for an accounting between this corporation and the Pullman Palace Car Company and other creditors.

In the absence of statutory authority, courts of chancery had no jurisdiction to decree a dissolution of a corporation by declaring a forfeiture of its franchise, either at the suit of an individual or of the State. *Verplanck v. Merchants' Ins. Co.* 1 Edw. Ch. 84; *Doyle v. Peerless Petroleum Co.* 44 Barb. 239; *Folger v. Columbian Ins. Co.* 99 Mass. 274; *Attorney General v. Bank of Niagara*, 1 Hopk. 354; *Denike v. New York, etc.* 80 N. Y. 605. The mode of enforcing a forfeiture of the charter at common law was by *scire facias* or *quo warranto* in courts of law only, and at the suit, only, of the sovereign. The judgment in such cases, at law, relates solely to the right to exercise the corporate franchise, and operates to extinguish corporate existence. In respect of trade corporations, independently of statutory provision, and notwithstanding the dissolution of the corporation, its assets belong to those who contributed to its capital and for whom it stood as representative in the business in which it was engaged, and are treated in equity as a trust fund, to be administered for the benefit of the *bona fide* holders of stock, subject to the just claims of creditors of the corporation. *Morawetz on Corporations*, 1032, and cases cited.

The necessity for invoking the aid of a court of equity after judgment of forfeiture at law, that court alone being competent to reach and administer the fund, has led to statutory enactments vesting courts

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

of equity with jurisdiction to decree a dissolution of the corporation and to wind up its affairs, in given cases, at the suit of an individual beneficiary of the fund. The power to confer such jurisdiction by statute, as one of the powers over corporations reserved by the State, has been uniformly recognized, and nowhere more clearly than in this State, (*Ward v. Farwell et al.* 97 Ill. 593; *Chicago Mutual Life Indemnity Ass. v. Hunt*, 127 id. 257,) and whenever the power of the court of chancery has been properly invoked the jurisdiction has been sustained. *Life Ass. of America v. Fassett*, 102 Ill. 315; *Chicago Life Ins. Co. v. The Auditor*, 101 id. 82; *Mining Co. v. Mining Co.* 116 id. 170, and cases *supra*.

By the 25th section of the statute for the incorporation of companies for pecuniary profit, being the only section applicable here, it is provided: "If any corporation, or its authorized agents, shall do or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for the payment of money, after demand made by the officer, to be returned, 'no property found,' or to remain unsatisfied not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or in any way liable for the debts of the corporation, by joining the corporation in such suits," etc. And after providing for *pro rata* liability of stockholders upon unpaid subscriptions, etc., and for enforcing the same, proceeds: "And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor," with authority to wind up its affairs.)

It is not pretended that the facts alleged bring the bill within the provisions of the clause of the statute first quoted. It is not alleged, nor are facts set forth showing, that any of the causes exist for which bills in equity are by this statute authorized to be filed. The bill invokes, not the power conferred by the statute, but the general chancery powers of the court. But it is said, in effect, that as the second clause of the statute quoted gives courts of equity power to decree the dissolution of a corporation "on good cause shown," it may exercise that jurisdiction whenever the interests of the stockholders, or any of them, in equity and good conscience demand it. We do not think the statute capable of that construction. It is clear that the purpose of the provision was to enable the court, in all cases in which the jurisdiction of the court was properly invoked under the statute, to afford complete relief. By the first clause a remedy is provided by which the assets of the corporation, in the cases enumerated in the statute, may be applied in payment of its liabilities, and if insufficient therefor, that subscribers for and holders of unpaid stock of the corporation may be compelled to contribute to the payment of any balance of corporate indebtedness after the application of the corporate effects, without first procuring a judgment of forfeiture at law. No judgment forfeiting the charter of



the corporation is necessary to authorize the court to afford this relief, but by the later provision the court may, in cases where cause of forfeiture exists, declare the same, and by its decree dissolve the corporation, and through its receiver administer and distribute the corporate estate, thus making the remedy in equity, in such cases, complete. (*St. Louis, etc. Mining Co. v. Mining Co.* 116 Ill. 170; *Alling v. Wenzel*, 133 id. 264.) As said by this court, in construing this provision of the statute, in *Chicago Mutual Life Ins. Co. v. Hunt*, 127 Ill. 274: "Courts of equity are given full power, on good cause shown, as a portion of the relief provided for by that section, to dissolve or close up the business of the corporation and to appoint a receiver of its effects." We are of opinion that it is only "as a portion of the relief provided for by that section" that the power to dissolve the corporation can be invoked. Moreover, "good cause" for dissolving the corporation would necessarily be a legal cause, — a cause for which the sovereign authority might by law, resume the franchise granted. It can not be presumed that the legislature intended, by the use of the language here employed, to authorize a decree forfeiting the corporate franchise for causes for which the State might not procure judgment of forfeiture at law. The bill is not maintainable upon this ground.

[Remainder of opinion omitted.]

*Judgment affirmed.*

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## ATTORNEY GENERAL v. TUDOR ICE CO.

1870. 104 *Mass.* 239.

INFORMATION in equity by the attorney general, on behalf of the Commonwealth, and at the relation of Richard Price, to restrain the defendants from engaging in or carrying on any business other than the cutting, storing and selling of ice. Hearing, on a motion for an injunction, before the chief justice, who reported the case as follows:

"The company was organized in 1861, under the Gen. Sts. c. 61, for the purpose of cutting, storing and selling ice. Its capital stock was fixed at \$360,000. It has carried on this business ever since, but has also carried on various other branches of business; has been in the habit of chartering vessels for the East Indies, loading them with ice so far as was proper, and completing the cargo by purchasing and exporting kerosene oil, tobacco, rosin and lumber; and has also imported merchandise of various kinds, including paddy, jute, linseed and tea. It has also erected buildings, and placed machinery in them, which cost about \$400,000. Some of the machinery is for the manufacture of tobacco, but the manufacture was discontinued about two years ago. Some of it is for cleaning rice, some for the manufacture

of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carries on, and the capital invested in them is three or four times larger than its capital stock. The business is connected with the exportation of ice, and has increased the profits of the company, but does not appear to be necessary to its legitimate business. It has imported two cargoes of tea, worth \$300,000, which had no connection with the ice trade. It does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason. I report the case for determination upon the questions, whether this information in equity can be maintained, and, if it can be maintained, whether a temporary injunction ought to be issued, upon the facts above stated."

*S. Bartlett*, for the Attorney General.

*C. B. Goodrich & H. W. Paine*, for the defendants.

GRAY, J. This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation; and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason." No case is therefore made, upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In *Attorney General v. Utica Insurance Co.* 2 Johns. Ch. 371, Chancellor Kent, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by information in the nature of a *quo warranto*; and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon filed, and sustained by the supreme court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.* 15 Johns. 358. Similar proceedings may be had at law in this Commonwealth in a

proper case. *Goddard v. Smithett*, 3 Gray, 116, 122, 123. *Attorney General v. Salem*, 103 Mass. 138. *Boston & Providence Railroad Co. v. Midland Railroad Co.*, 1 Gray, 340. Gen. Sts. c. 145, §§ 16-24.

One early English case of high authority, not cited by Chancellor Kent, nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the attorney general, at the relation of several freemen of the Weavers' Company, against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, &c., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, &c., was the end of the bill. To which the defendants demurred, because, as to part of the bill, it was to subject them to prosecutions at law, and to a *quo warranto*; and as to the other parts, the plaintiffs had remedy by *mandamus*, information, or otherwise, and not here. And of the same opinion," the report proceeds, was Lord Cowper, "who said it would usurp too much on the king's bench; and that he never heard of any precedent for such a case as this; and so allowed the demurrer." *Attorney General v. Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131.

The modern English cases, cited in support of this information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation and held by municipal corporations or officers upon specific public trusts. Such were *Attorney General v. Norwich*, 16 Sim. 225, *Attorney General v. Guardians of Poor of Southampton*, 17 Sim. 6, and *Attorney General v. Andrews*, 2 Macn. & Gord. 225.

The hypothetical case, in which Lord Westbury, in *Stockport District Waterworks v. Manchester*, 9 Jur. (N. S.) 266, said that he should "probably not hesitate" to act upon the information of the attorney general, was of a suit to restrain the making of a contract between an aqueduct corporation and a city to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from *Liverpool v. Chorley Water Works Co.* 2 De Gex, Macn. & Gord. 852, 860, and *Ware v. Regent's Canal Co.* 3 De Gex & Jones, 212, 228, were but *dicta* that an unauthorized diversion of water or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the attorney general.

The case of *Attorney General v. Great Northern Railway Co.* 4 De Gex & Smale, 75, was a clear case of nuisance, the unlawful

obstruction of a public highway by a railroad. That of *Attorney General v. Oxford, Worcester & Wolverhampton Railway Co.* 2 Weekly Rep. 330, was the case of the opening of a railway line in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public.

The single case, in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers, is *Attorney General v. Great Northern Railway Co.* 1 Drewry & Smale, 154, in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice Chancellor Wood, two years later, in *Hare v. London & Northwestern Railway Co.* 2 Johns. & Hem. 80, 111.

In *Attorney General v. Mid Kent Railway Co.* Law Rep. 3 Ch. 100, a mandatory injunction was granted upon the information of the attorney general to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection that the attorney general might have had an equal and complete remedy at law was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the king or his attorney general, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Pract. (3d Am. ed.) 6, 7. *Attorney General v. Gahway*, 1 Molloy, 95, 103. However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate and complete remedy at law, as well in suits by the Commonwealth as in those brought by private persons. Gen. Sts. c. 113, § 2. *Commonwealth v. Smith*, 10 Allen, 448. *Clouston v. Shearer*, 99 Mass. 209, 211, and other cases there cited. The 38th of the former rules in chancery of this court (14 Gray, 360) by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the Constitution and laws of the Commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established. Rules of 1870, *post*, 555.

The only cases in which informations in equity in the name of the attorney general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. *District Attorney v. Lynn & Boston Railroad Co.* 16 Gray, 242. *Attorney General v.*

*Cambridge, Ib.* 247. *Attorney General v. Boston Wharf Co.* 12 Gray, 553. *Rowe v. Granite Bridge Co.* 21 Pick. 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. *County Attorney v. May*, 5 Cush. 336. *Jackson v. Phillips*, 14 Allen, 539, 579. *Attorney General v. Garrison*, 101 Mass. 223. Gen. Sts. c. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them.

*Information dismissed.*

## CHAPTER XII.

## LIABILITY OF CORPORATION FOR TORTS.

## YARBOROUGH v. BANK OF ENGLAND.

1812. 16 *East*, 6.

THE plaintiffs declared in trover against the corporation of the Governor and Company of the Bank of *England*, for three promissory notes of the Bank of *England*, payable on demand, each for 100*l.* describing them by their dates and numbers, to which the defendants pleaded the general issue: and after a verdict for the plaintiffs before Lord *Ellenborough* Ch. J. at *Guildhall*, it was moved in the last term to arrest the judgment, on the ground that the action of trover, which was founded in tort, did not lie against a corporation: but it was at the same time explained by *Bosanquet*, who made the motion, that the objection did not originate with the Bank, who merely lent their names upon this occasion to protect the true owner of the notes, Mr. *Sidney* of *Furnival's-Inn*, who had been robbed of them on the 22d of *June* last, and had immediately given notice to the Bank to stop payment of them, under his indemnity. That the plaintiffs, who were bankers at *Doncaster*, had several months afterwards received them in the course of their business in exchange for their own notes, from a person who gave in the name of Capt. *Johnson*, but whom they did not know; and consequently all means of tracing the property were lost. And the real contest in this action was between Mr. *Sidney* and the plaintiffs; Mr. *Sidney* imputing negligence to them in the transaction.

The case was argued on *Saturday* last by *Taddy*, against the rule, and by *Garrow* and *Bosanquet*, in support of it; when the Court said that they would look into the authorities before they delivered judgment; which was now pronounced by

LORD ELLENBOROUGH, Ch. J. In this case, which was argued on *Saturday*, the only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: they cannot, as a corpora-

tion, be subject to a *capias* or *exigent*, (the process in trespass,) because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But wherever they can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others. A corporation having the return of writs, or to which any writ, or a *mandamus*, for instance, is directed, is liable eventually to an action for a false return. The case of *Argent v. The Dean and Chapter of St. Paul's*, in this court about the year 1781, was an action for a false return to a *mandamus* respecting an election to a verger's place in that cathedral; and no objection was made that the action would not lie. *Vidian's Entries*, p. 1. is an action for a false return against the mayor and commonalty of the city of *Canterbury*, for a false return to a writ of *mandamus* to restore an alderman to his precedence of place, &c. It states the mayor and corporation as *attached* to answer, and the return as falsely and *maliciously* made. The instances of actions against corporations for false returns to writs of *mandamus*, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries. *Bro. Corporations*, pl. 48. A corporation cannot be aiding to a trespass, nor give a warrant to do a *trespass without writing*; and cites 4 *Hen. VII.* 9. and certainly it appears by that case, and by the sequel of it in 4 *Hen. VII.* 16. that a corporation cannot give a command to enter into land, without deed, nor do a thing which vests or divests a freehold, nor *accept a disseisin made to their use, without deed*. But many little things, it is said, require no command; by which must be meant no special commanding, as a command to servants to chase cattle out of their lands, or to make hay: being things which it is incident to a servant to do, and which he is bound to do without command: and if he do it, it is good, and the command is not material, for he may do it without command. A corporation cannot do a *tort but by their writing under their common seal*: per *Fitzjames' Justice*; *Bro. Corporations*, pl. 34. cites 14 *Hen. VIII.* 2. 29. which imports that *by their writing* they may. A corporation may be defendants in an action of *quare impedit*, and the hindrance is an act of *tort*. *Butler v. The Bishop of Hereford and the University of Cambridge*. *Barnes, C. P.* 350. To which a multitude of other instances may be added. *Rast.* 497. *Ast.* 378. 2 *Mod. En.* 291. *Winch.* 625. 700. 721. 733. 2 *Lut.* 1100. 3 *Lev.* 332. The stat. 9 *H. IV.* c. 5. recites the practice, in assizes of novel "*disseisin and other pleas of land, of naming the mayor and bailiffs and commonalty of a franchise, as disseisors, in order to oust them of holding plea thereof; and directs the inquiry before the judges of assize, whether they be disseisors or tenants, or be named by fraud;*" which plainly proves that they may be considered as disseisors; and there are instances of trespass against corporations. In 44 *Ed. III.* 2. pl. 5. which was after 22 *Ass. pl.* 67. cited in the

argument, trespass was brought against the mayor and commonalty of *Hull* and another person; and the objection made was not that trespass would not lie against the corporation, but that as a natural person was joined with them, there must be different processes; a distress against the former, and a *capias* against the latter. But the objection does not appear to have prevailed. In 8 *H. VI.* 1. 14. trespass was brought against the mayor, bailiff, and commonalty, and one of the commonalty; and the objection was not that trespass would not lie against the corporation, but that it could not be supported against them and an individual of their body; and *Bro. Corporations*, pl. 24. says, the better opinion was that the writ was good; and 14 *Hen. VIII.* 2. says it was so awarded, and that in that case all the justices agreed to it. *Brook* also puts the case, "if mayor and commonalty disseise me, and I release to 20 or 200 of the commonalty; this will not serve the mayor and commonalty;" and the reason is because the disseisin is in their *corporate* character, and the release is to the individuals. And the case is put "that if mayor and commonalty disseise one of their own body, he shall have assize against them;" which clearly imports that the corporation, as such, might be disseisors. Also, in 4 *Hen. VII.* 13. trespass was brought against the mayor and commonalty of *York*: they justified under a right in the inhabitants to have common: but this was adjudged no plea, because the right in natural persons gave no right to the corporation, and the trespass was alleged in the corporation. They then pleaded as bailiffs in aydant: but it was adjudged that they could not be bailiffs aiding to a trespass, "nor could they give warrant *without writing* to commit a trespass; which implies that by proper writing, namely, by deed under their common seal, they might. In the present case, which is after verdict, it must be presumed that a competent conversion was proved; and if it be essential to such conversion that there should have been an authority from the company under seal to detain the notes on their behalf, that such authority was proved. The fact, by reference to my notes, is that it was admitted that the bank detained the notes in question, under an indemnity; and as no objection was taken to the terms of the admission, a competent detention, *i. e.* through the means of servants properly authorized to detain on their behalf, was thereby admitted; and therefore the presumption of due proof, after verdict, is in effect warranted by the facts of the case, if it had been material, which it by no means is, to resort to them. In the case of *The King v. John Biggs*, 3 *P. Will.* 419. it was made a question upon a special verdict in a case of capital felony, for erasing an indorsement upon a bank note, whether a person intrusted and employed by the governor and company of the bank of *England* to sign notes on their behalf, was competently authorized for that purpose, not having been, as the special verdict expressly found, so entrusted and employed *under their common seal*. There is a long and learned argument of the reporter, Mr. *Peere Williams*, in which the authorities, as to what acts a cor-



poration may do by their servant without an authority under their common seal, are drawn together. The majority of the judges who sustained the conviction must have been of opinion that an authority under their common seal was not essentially necessary for such a purpose; indeed according to the report in 1 *Stra.* 18. of the same case, the doubt of the judges must have turned upon another point, namely, upon the import of the word *endorsement*, (*i. e.* the writing alleged to be erased;) and whether it could be satisfied by an erasure of what was written on the face of the note. As to which Sir *John Strange* in his report says, "That it was held by all the judges that the defendant was guilty; for the writing on the face of the note was of the same effect as an endorsement, and being introduced by the company instead of writing on the back, and always accepted and taken to be an endorsement, was within the words of the indictment." The objection of the want of authority under the common seal, is not even noticed in the report of this case by Sir *John Strange*. However, if there would have been anything in the objection in this case, if made at the trial, there is nothing in it after verdict, when it must be presumed, as I have already stated, that all the competent proof which could be made in support of the action was made, and of course that an authority under seal for the detention of the notes was proved, if such proof were at all necessary.

*Rule discharged.*

## MAUND v. MONMOUTHSHIRE CANAL CO.

1842. 4 *Manning & Granger*, 452.

TRESPASS for breaking and entering locks on a canal, and seizing and carrying away barges and coal.

Pleas: not guilty (by statute)<sup>1</sup> and payment of money into court.

At the trial, before *Cresswell J.*, at the last assizes for *Monmouthshire*, it was proved that the trespasses in question had been committed by one *Cooke*, who was the agent of the company, which was incorporated by act of parliament;<sup>1</sup> and that the barges and coal had been seized for tolls claimed to be due to them. The only question raised was, whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of his authority. A verdict was taken for the plaintiff, damages 50*l.*, leave being reserved to move to enter a verdict for the defendants.

*Talfourd* Serjt. in last term, obtained a rule nisi accordingly, or to arrest the judgment. He cited the case of *Sutton's Hospital*,<sup>2</sup> *Anon.*,<sup>3</sup> *Morgan v. The Corporators of Carmarthen*,<sup>4</sup> *Thusfeld* and *Jones's*

<sup>1</sup> 36 *G. 3. c. cii.*

<sup>2</sup> 12 *Mod.* 559.

<sup>3</sup> 10 *Co. Rep.* 32.

<sup>4</sup> 3 *Keb.* 350.

case,<sup>1</sup> *Com. Dig. tit. Franchises* (F. 19.), 6 *Vin. Abr. tit. Corporations* (B. a.).

*Ludlow*, Serjt. now shewed cause. The act of parliament by which the company is incorporated provides that they may sue and be sued: it also empowers them to enter on lands. If they enter improperly, it would seem, that they may be sued for the trespass. The whole doctrine that a corporation cannot be sued in trespass rests on one passage in *Bro. Abr. Corporations*, 43;<sup>2</sup> where the reason given is, that neither *capias* nor *exigent* can go against them. A *distringas*, however, may be issued against a corporation. It has been decided that trover will lie against a corporation; *Yarborough v. The Bank of England*;<sup>3</sup> where Lord *Ellenborough* C. J., in giving the judgment of the court, reviews all the authorities upon the subject. [*Tindal* C. J. That case was after verdict. It was a motion in arrest of judgment: no leave appears to have been reserved.] But the broad doctrine is laid down that trover would lie; and there is no difference in principle between that action and trespass. The payment into court in this case admits that the action is rightly brought. An indictment will lie against a corporation, although all the ordinary consequences cannot follow.<sup>4</sup> Various

<sup>1</sup> *Skin*. 27.

<sup>2</sup> "Nota, per *Thorpe*, that trespass lies not against commonalties, to wit, by the name of corporation, but against the persons who did it, by their proper names; for neither *capias* nor *exigent* lies against a commonalty; nor shall a commonalty implead or be impleaded but with the mayor or bailiffs, if they have mayor or bailiffs; and there by him (*i. e.* according to *Thorpe*) there may be a corporation by name of a commonalty, without mayor, bailiff, or other head." Citing 22 Ass. p. 67. (22 Ass. fo. 100. pl. 67.)

In *Bro. Trespass*, pl. 239., Lord *Brooke* abridges the same case thus: "Nota, per *Thorpe*, that trespass lies not against a commonalty, but shall be brought against the persons by their own names; for neither *capias* nor *exigent* lies against a commonalty."

In the Book of Assizes, the case is thus reported at large:—

"Nota, by *Thorpe*." (Chief Justice of the King's Bench), "that a writ of trespass lies not against a commonalty; but it is necessary in such writs that the persons be named in certain; for he said that a man shall never have a *capias* or *exigent* against a commonalty; *et hoc patet* in a bill of trespass brought by *J. A. W.* against certain persons and the commonalty of the town of *J.* Also he said that the commonalty of any town shall never be named in any action, defendant or plaintiff, unless the mayor or bailiff be named, if there be a mayor or bailiff, &c., and if there be no mayor or bailiff, then the commonalty may be solely named, &c."

In the case of *The Mayor, Sheriffs, and Commonalty of Norwich*, *M.* 21 *E.* 4, fo. 12, pl. 4., *Cutesby J.* (fo. 14.) says, "It cannot be denied that the mayor, sheriffs, and commonalty are one entire body, which cannot be severed, and which cannot do any corporal wrong." But a writ of trespass for disturbance in taking the profits of liberties against a corporation (sued jointly with an individual) was held to be maintainable; *Archbishop of York v. Mayor and Commonalty of Hull and Another*, *H.* 45 *E.* 3, fo. 2, pl. 5. So, for disturbance in holding a court-leet; *Prior of Merton v. Mayor of New Windsor and Others, Burgesses of the said Town*, *T.* 18 *H.* 6, fo. 11, pl. 1.

And see *The Mayor and Commonalty of Winchester's case*, 31 Ass. fo. 188, pl. 19.; *M.* 8 *H.* 6, fo. 1, pl. 2.; *M.* 9 *H.* 6, fo. 36, pl. 9.; *Great Yarmouth case*, *M.* 20 *H.* 6, fo. 9, pl. 19.; *Kedwelly's case*, *M.* 15 *E.* 4, fo. 2, pl. 2.; *T.* 4 *H.* 7, fo. 13, pl. 11.

<sup>3</sup> 16 *East*, 6.

<sup>4</sup> See 1 *Kyd, Corp.* 225.

instances are collected in *Kyd on Corporations*,<sup>1</sup> where trespass has been brought against a corporation.<sup>2</sup> Other authorities are mentioned in 1 *Wms. Saund.* 340. n. The principle that a corporation is liable in tort for the tortious act of its agent, done in its ordinary service, is further carried out in *Smith v. The Birmingham Gas Company*.<sup>3</sup> [Tindal C. J. The process is the same both in case and in trespass — namely, by attachment, distress, capias and outlawry. If case will lie, it is difficult to see why trespass should not lie also.]

Talfourd Serjt. was then called upon to support the rule, and admitted that he had nothing to rely upon but the old authorities: and that in *Regina v. The Birmingham and Gloucester Railway Company*,<sup>4</sup> the court of Queen's Bench had, in this term, refused to quash an indictment against a corporation. The doctrine in *Bro. Abr.*, however, is imported into *Com. Dig.* tit. *Franchises* (F. 19.).<sup>5</sup>

TINDAL C. J. The process in case and trespass being the same; it is impossible to see any distinction between the two actions.

*Per curiam.*

Rule discharged.

## CHESTNUT HILL, &c. TURNPIKE CO. v. RUTTER.

1818. 4 *Sergeant & Rawle* (Pa.), 6.

### IN ERROR.

This was an action of trespass on the case [brought by Rutter against the Turnpike Co.], in the Common Pleas of *Montgomery* county, for stopping a water course. —

<sup>1</sup> Vol. i. pp. 223–225.

<sup>2</sup> The author nevertheless draws this conclusion: — “Notwithstanding these examples, however, it may well be doubted whether, at this day, such an action could be maintained against a corporation aggregate; the action supposes a *personal* act, of which the corporation is incapable in its collective capacity: the act therefore, which is the foundation of the action, must be done by some individual in order to assert the right of the corporation, and the action being brought against that individual, will answer the purpose of bringing the right to a judicial determination.

“It is accordingly decided that a *replevin* cannot be maintained against a corporation aggregate, because it is founded on a distress, which the corporation cannot take but by its bailiff.” Citing *Brownl.* 175., *Bac. Abr.* tit. *Corporations*, (E. 2.)

<sup>3</sup> 1 *A. & E.* 526.

<sup>4</sup> Since reported, 2 *Q. B. Rep.* 47., 1 *G. & D.* 457., 2 *G. & D.* 236.

<sup>5</sup> Where it is also said that “process of outlawry does not lie against a corporation aggregate; 45 *E.* 3, 2, 3. (The reference is to *The Archbishop of York v. Mayor and Commonalty of Hull and Another*, *H.* 45 *E.* 3, fo. 2, pl. 5.) *antè*, 454. n., nor a subpoena; for it has no conscience, *D.* 2 *Bul.* 233.” (The reference is to *The Company of Shipwrights of Redderiffe's* case.)

It is observable, that the dictum of *Thorpe* C. J. in the Book of Assizes, does not, in terms, apply to all corporations aggregate, as such, but to municipal corporations only.

The declaration stated, that the defendants below, the plaintiffs in error, were incorporated by an act of assembly, passed on the 5th day of *March*, 1804, entitled, "an act to enable the Governor of this Commonwealth, to incorporate a company to make an artificial road, from the top of *Chestnut Hill*, through *Flourtown*, to the *Spring House* tavern, in *Montgomery* county;" that the plaintiff was seized of a messuage, tanyard, and tract of land, through which a rivulet from time immemorial, had flowed, &c.; and that the defendants *contriving, and wrongfully, and injuriously intending to injure* the said plaintiff, and to deprive him of the benefit of working and tanning leather, in the said tanyard, and of the profit that might accrue therefrom, *did wrongfully and unjustly erect and set up, certain jetties or piers*, on each side of the said rivulet, by reason whereof, the said rivulet was thrown back, and overflowed the said tanyard, and destroyed a great quantity of hides, &c.

By the 9th section of the act of incorporation,<sup>1</sup> the company had power "to erect permanent bridges over all the waters crossing the said road."

The jury found a verdict in favour of the plaintiff, for 305 dollars.

The errors now assigned were, 1. That the Court below permitted an action to be maintained against a body corporate for a tort.

2. That the declaration, if such an action could be maintained, set forth no cause of action.

*E. Ingersoll* and *Ingersoll*, for plaintiffs in error.

[After discussing the history of actions:]

It was never, however, pretended, that an action of trespass *vi et armis*, would lie against a corporation, which, from its nature, is incapable of committing a tort; nor can the same thing in effect be done, by changing the form of action, and calling it an action on the case. Corporations can no more be guilty of torts than executors; the analogy between them, in this respect, is strong, and it has been decided, that trover does not lie against an executor for a conversion by his testator. *Hambly v. Trott*.<sup>2</sup> Indeed, it was once doubted, whether *assumpsit* would lie against a corporate body, because it could make no promise without affixing its seal, and the Supreme Court of this State, went so far on one occasion as to decide, that it would not. *Breckbill v. Turnpike Company*.<sup>3</sup> The remedy for a tort is not against the corporation, but against the individual who commits it, who may have his action over against those who employed him. The relation of master and servant, as it exists between individuals, does not hold between corporations and those who act under their orders. *Kyd on Corp.* 223, 260, 450. If the servant of a corporation commit an assault and battery, it will not be pretended, that the corporation is responsible. If it be not responsible for an assault

<sup>1</sup> Pamph. L. 215.

<sup>2</sup> Cowp. 372.

<sup>3</sup> 3 Dall. 496.

and battery committed by its servant, the relation of master and servant does not exist; because nothing is more clear than that a master is responsible for the torts of his servant, committed in the course of his master's business. How can a distinction be drawn between an assault and battery, and injuries of the nature of that complained of in this suit? It is impossible to say where the line should be placed.

Corporations are the creatures of the law, of a highly refined and intangible nature, whose properties and attributes, lawyers alone can understand. Deriving their existence from the law, they must be governed by the terms of the law which creates them. They must proceed and be pursued in the path prescribed by the law. If the corporators do an act, beyond their corporate powers, they, as individuals, and not the corporation of which they are members, must answer it. If the corporation itself enter into a contract not authorised by its charter, no action founded on the contract can be sustained, though the individual members may be sued. Suppose an insurance company should undertake to make a turnpike road, or to build a church, could those who were employed by them, recover against the corporation as such? Every principle of the law of corporations forbids it. Now, a corporation never was and never can be authorised by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorised to commit a wrong, it is out of the scope of its corporate powers. The act of the law, like the act of God, can work a wrong to no one, and if a man sustain damage by it, it is *damnum absque injuria*. The plaintiff in this case, therefore, must look to the individual from whose acts he sustained an injury, who never was, and never could be authorised to commit a tort. The principle that a body corporate can only act in strict pursuance of the objects of its incorporation, is stated and exemplified in the conclusion of the Lord Chancellor's opinion, in the case of *Child v. Hudson's Bay Company*.<sup>1</sup> It is also established by the cases of *Beatty v. Marine Insurance Company*,<sup>2</sup> and *Head v. Providence Insurance Company*,<sup>3</sup> *Steele v. President &c. of Lock Navigation*,<sup>4</sup> *M'Clennahan v. Curwen*.<sup>5</sup>

Between *nonfeasance* and *malfeasance*, a marked distinction exists. It is not denied, that for *nonfeasance*, actions of trespass on the case have been sustained, as in the case of the *Mayor of Lynn (in error) v. Turner*,<sup>6</sup> where the action was against the corporation of *Lynn Regis*, for neglect of duty, in not keeping a creek in repair; in the case of *Townsend v. Susquehannah Company*,<sup>7</sup> for neglecting to repair a

<sup>1</sup> 2 P. Wms. 209.<sup>2</sup> 2 Johns. 114.<sup>3</sup> 2 Cranch, 166.<sup>4</sup> 2 Johns. 283.<sup>5</sup> 6 Binn. 509.<sup>6</sup> Cowp. 86.<sup>7</sup> 6 Johns. 90.

bridge, and in several similar cases. *Gray v. Portland Bank*,<sup>1</sup> *Stephens v. Middleton Canal*.<sup>2</sup> In *Riddle v. Proprietors of locks and canals on the Merrimac*,<sup>3</sup> PARSONS C. J. lays down the law more broadly than by his authorities he is warranted in doing, yet he does not go so far as to assert the general proposition, that trespass will lie against a corporation. He merely says, that in *certain* cases, trespass may be maintained; and it is to be observed, that the action in which the opinion was delivered, was for a *nonfeasance*; a neglect of a corporate duty in not keeping the canal in order.

On recurring to ancient authorities, it will appear, that trespass against a corporation for a *tort*, has never been sustained. THORPE J. in the *Book of Assizes*, 22 *Edw.* 3. p. 100. expressly says, that trespass never lies against a corporation. A corporation and an individual cannot be joined in trespass as defendants. 8 *H.* 6. 1. *pl.* 2. A corporation cannot commit a disseisin except for its own use. *Mich.* 8 *H.* 6. *pl.* 34. *p.* 14. *Mich.* 9. *H.* 6. *pl.* 9. *p.* 36. *Hil.* 22. *H.* 6. *pl.* 36. *p.* 46. Trespass does not lie against a corporation in its corporate name. *Vin. Corp.* *pl.* 15. *p.* 300. Nor will an attachment lie. *Id. B. A.* *pl.* 3. *p.* 311. Nor replevin. *Id. X.* *pl.* 17. *p.* 308. In trespass against an abbot he shall be named by his name of baptism. *Id. Q.* *pl.* 9. *p.* 300. An action for a false return to a *mandamus*, must be against the individual members of the corporation. *Id. Q.* *pl.* 50. *p.* 303. A corporation cannot beat or be beaten. *Id. Z.* *pl.* 2. *p.* 309. If a corporation disseise, it is in their natural and not in their corporate capacity. *Bac. Ab. Corp. E.* *pl.* 5. Trespass does not lie against a corporation. *Com. Dig. Plead.* 2. *B.* *p.* 196.

2. If the plaintiffs in error, be capable of inflicting the injury imputed to them, the declaration sets forth no cause of action.

[The argument on this point is omitted.]

*Binney*, for the defendant in error. This case presents three questions. 1. Whether a corporation can commit a tort? 2. Whether, if it can, this is the proper form of action? 3. Whether the cause of action is well set forth?

It must now be taken as proved, that the company gave authority to their servants to do the act complained of. The rule between corporations and their servants, is substantially the same, as between individuals and their servants. If, therefore, they give their servants power to do an act in pursuance of their corporate character, and they do it improperly, the corporation are responsible in the same manner as any other master. Why should a difference exist, and why should a corporate body be protected in the commission of wrong? If a corporation be the intangible being it is asserted to be, a greater and mere mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal, and they are not answerable for the con-

<sup>1</sup> 3 Mass. R. 364.

<sup>2</sup> 12 Mass. R. 466.

<sup>3</sup> 7 Mass. R. 169.

sequences. If the act be not within the range of their legitimate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and, therefore, it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any Court of justice. The master is responsible for the acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them. If the servant exceed the power he has received, the master must answer it. So if the company give their servant authority to make a road, in pursuance of their power to do so, and he exceed that authority, they are answerable, because he is their servant. The rule which makes the master responsible for the acts of the servant, is declared by SEDGWICK J. in delivering the opinion of the Court, in the case of *Gray v. Portland Bank*,<sup>1</sup> to apply with peculiar force to corporations and their agents. The position that a corporation can do no wrong, is pernicious in its consequences, and unfounded in law. If I put a note in bank, and wish to get it out, to put it in suit, and the bank refuse to deliver it, surely the remedy is an action of trover. If I refuse an exorbitant toll, in consequence of which, my horse is taken from me, and I cannot get him from the toll gatherer, can it be doubted, that I may have an action of trover against the company? If I cannot look to the company, there is no remedy, because the toll gatherer may be worth nothing, or may have gone off; nor can the individual members be resorted to unless they were guilty of malice. If a quagmire or any other nuisance exist, the supervisors where there is no turnpike company may be indicted; and where a company are invested with the duties of supervisors, they may be indicted. The corporators as individuals cannot be indicted, because it is not within the line of their duty as such.

As to the form of action, it is difficult to point out any other remedy for injuries of this description than trespass on the case, and if there be no other remedy, this is the right one. *Assumpsit* certainly would not lie, because there was no contract; nor would trespass *vi et armis*, because the damage was consequential. The old authorities which have been referred to, belong to a period, when the English lawyers were more distinguished for subtlety than for sound sense; and when the nature of corporations was greatly refined upon. It appears, however, from 2 *Inst.* 697. 703, that a corporation was then considered as substantially an inhabitant or occupier; and subsequently in *Rex v. Gardener*,<sup>2</sup> it was held, that a corporation seised of land for their own profit in fee, are, within the statute of 43 *El. c. 2*, inhabitants or occupiers of such lands, and liable in respect thereof, to be rated in their corporate capacity to the poor. In the Supreme Court of the *United States*, it has been decided, that a corporation may sue in the Circuit Court of the *United States* as a citizen. *Deveau v. Bank of*

<sup>1</sup> 2 Mass. R. 385.

<sup>2</sup> Cowp. 79.

*United States*.<sup>1</sup> The law on the subject of corporations has of late been greatly and beneficially altered. It was formerly held, that they could do nothing except under their seal, and for that reason *assumpsit* would not lie against them. All these niceties, however, are now repudiated, and they may enter into contracts either express or implied, without seal. When a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorised agents, are *express* promises by the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, on which an action lies. *Bank of Columbia v. Patterson's administrators*.<sup>2</sup>

The opinion of THORPE J. which is much relied on, was nothing more than a *dictum*, and was grounded upon the necessity which then existed of a *capitur pro fine* and *exigent*, which could not be entered against a corporation. These, however, are now exploded, and giving to the assertion of THORPE, all the weight to which it can possibly be entitled, the authority must fail, because the reason of it no longer exists. The distinction taken between a *misfeasance* and a *non-feasance* is altogether ideal; it has no solid foundation. The authorities all shew, that the action will lie in either case. If a company be guilty of a *tort* by neglecting a road or bridge, how can they be reached but in this form of action? That this is the proper form, is proved by the cases adduced on the opposite side. The *Mayor of Lynn v. Turner*, was clearly an action of trespass on the case, for a *tort*; so was *Townsend v. Susquehanna Turnpike Company*, and *Riddle v. Proprietors of Locks, &c. on Merrimack*. In two of these cases the point was not made, and in the third, it was overruled. As respects the form of action, there is no difference between *nonfeasance* and *misfeasance*; trespass on the case, is the general form. We are, therefore, brought back to the point from which we set out, whether a corporation can commit a *misfeasance*, which is clearly proved, not only by the late, but by the ancient authorities, and even by some of those which have been cited for the plaintiffs in error. *Trespass against the Mayor and Commonalty of York*; plea that all the inhabitants had right of common, in the place where the trespass, &c.; not good, because the action is against the corporation, and the plea a justification as to individuals. Plea altered, and the corporation said to be aiding in the trespass; adjudged that they cannot be aiding, *nor can they give a warrant to commit a trespass without writing*. 4 H. 7. pl. 11. p. 13. A corporation cannot authorise a wrong to be committed, *except by writing under their common seal*. *Brook. Corp. pl. 34. p. 189*. These authorities prove the *capacity* of a corporate body to commit a wrong, and shew the position said to have been laid down by THORPE, to be erroneous. *Trespass against the Mayor, Bailiffs, and Commonalty of Ipswich, and one Jabez*. Objection was taken, that a

<sup>1</sup> 5 Cranch, 65.

<sup>2</sup> 7 Cranch, 299.



corporation and an individual cannot be joined in one writ, but no objection taken, to trespass having been brought against a corporation. 8 H. 6. pl. 2. p. 1. *Id.* pl. 34. p. 14. An assize of *novel disseisin* was maintained against the mayor and commonalty of *Winton*. *Lib. Ass.* 31. *Ass.* pl. 19. In trespass against a corporation, if defendant plead a *misnomer*, plaintiff may reply, known by one name or the other. 6 Vin. pl. 42. p. 303. The result of these authorities is, that even in ancient times, trespass could be sustained against a body corporate.

[Omitting argument as to sufficiency of declaration.]

TILGHMAN C. J. This is an action on the case, brought by *James Rutter* against *The Chestnut Hill & Spring House Turnpike Company*, for an injury done to the plaintiff's land and tanyard, in consequence of certain piers erected by the defendants, on each side of a stream of water, by which the stream was obstructed and thrown back, and overflowed the plaintiff's land.

The defendants below, who are plaintiffs in error, rely on two objections. 1. That a corporation is not suable in this kind of action. 2. That the declaration does not state a good cause of action, even if the defendants were liable to an action in this form.

1. Corporations have lately been so multiplied in the *United States*, that they stand a very prominent part, in the business of the country. It has, therefore, been necessary to consider with great attention, their nature, and their rights, both as to suing and being sued. And as it would be extremely inconvenient, that they should do wrong without being amenable to justice, the inclination of the Court has been to hold them responsible. There was a time, when it seems to have been supposed, that they could make no contract, but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But upon reflection, this reason has been thought insufficient; for if pursued to its full extent, it would prove, that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now if it can appoint an agent without seal, for one purpose, there is no reason why it may not for another. Accordingly, in the case of *The King v. Biggs*, 3 P. Wms. 419, on a special verdict in a case of capital felony, it was held, that the *Bank of England* might *without seal*, authorise a person to sign notes in its behalf. And it was decided by the Supreme Court of the *United States*, in the case of *The Bank of Columbia v. Patterson's administrators*, 7 Cranch, 299, that a corporation may, *without seal*, enter into a contract, express, or even implied. In the words of Judge STORY, by whom the opinion of the Court was delivered, "when a corporation is acting within the

scope of the legitimate purpose of its institution, all parol contracts made by its authorised agents, are *express* promises of the corporation, and all duties imposed on them by law, and all benefits conferred, at their request, raise *implied* promises, for which an action lies." By this decision, I consider the law as settled. It does, indeed, seem to have been the opinion of *this Court*, in the case of *Breckbill v. The Lancaster Turnpike Company*, 3 *Dall.* 496, that an action of *assumpsit* would not lie against a corporation. But the law had not been at that time fully considered, and I may say, that our late brother YEATES, who was on the bench when *Breckbill v. The Lancaster Turnpike Company* was decided, was satisfied as to the propriety of acquiescing in the authority of *The Bank of Columbia v. Patterson's administrators*.

But it is objected that the present action is not on *contract* but on *tort*, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorised by its charter. But the charter does not authorise it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of labourers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorised by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the Courts seems to have been more uniform than with respect to contracts. For it may be shewn, that from the earliest times to the present, corporations have been held liable for torts. Many cases have been cited from the year books. Upon examination, they do not all answer the citations, but enough appears to shew that the law was so understood. In 4 *Hen.* 7. p. 13. *pl.* 11, we find an action of trespass against the Mayor and Commonalty of *York*. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: *held*, not good, because the action is against the *corporation*, and the plea is a justification as to *individuals*. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass *without writing*. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose, the point being, whether a corporation can commit a trespass. In 8 *Hen.* 6. p. 1. *pl.* 11. and p. 14. *pl.* 34, trespass was brought against the Mayor and Bailiffs, and Commonalty of *Ipswich*, and one *J. Jabez*. It was objected, that a corporation and an

individual cannot be joined in one action; but it was not objected that trespass does not lie against a corporation; and the objection is said to have been overruled in 14 *Hen.* 8. 2. In the book of assises (31. *Ass. pl.* 19.) it appears that an assise of novel disseisin was maintained against the Mayor and Commonalty of *Winton*. *Brook* lays it down, that if the Mayor and Commonalty disseise one who releases to several *individuals* of the corporation, this will not serve the Mayor and Commonalty, because the disseisin is in their *corporate* capacity. In the old books of entries are numerous precedents of writs of *quare impedit* against corporations, and in *Vidian's Ent.* 1. is a declaration in an action on the case (16 *Car.* 2.), against the Mayor and Commonalty of the city of *Canterbury*, for a false return to a *mandamus*. To come to more modern times, it was held in the Mayor of *Lynn, &c.* (in error,) v. *Turner*, (*Cowp.* 86,) that an action on the case lies against a corporation for not cleansing, and keeping in repair, a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our revolution. The laws of the Commonwealth forbid my tracing this point through the English Courts, since the revolution, but we shall find abundant authority in the Courts of our own country. In *Gray v. The Portland Bank*, 6 *Mass. Rep.* 364, it is laid down, that the bank was responsible for wrongs done by itself or its agents. In *Riddle v. The Proprietors of the Locks, &c. on Merrimack river*. 7 *Mass. Rep.* 169, an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in *Townsend v. The Susquehanna Turnpike Company* (6 *Johns.* 91,) an action was supported for the loss of a horse, killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt, that the form of action, in the present case, is good.

The objection to the declaration remains to be considered. It is said, that the act of assembly, by which this company is chartered, gives them power to erect bridges over all the streams which cross the road, and, therefore, they are not responsible for any damages which may be suffered in consequence of these bridges. But this is too broad a proposition: for, granting that they would not be responsible for damages unavoidably resulting from a bridge built in the best manner, and obstructing the passage of the water, no more than was necessary for its proper construction, it would not follow that they should not be answerable for damages arising from a bridge so carelessly or inartificially built, as to occasion an unnecessary and wanton obstruction. Now, the declaration alleges, that the defendants contriving, and wrongfully and injuriously intending to injure the plaintiff, &c. *did wrongfully and unjustly set up certain piers, &c.* So that we are bound, after verdict, to suppose that it was proved the defendants were in fault, in the manner of erecting the piers. To say, now, that they were guilty of no wrong, would be to declare that it is impossible for

them to be made answerable for *any injury which may arise from any kind of bridge or piers*. This is going farther than I can permit myself to do, being satisfied that the law never intended to authorise damage without necessity. Whether the company would be answerable for damages occasioned by a bridge or piers, of proper construction, is a point of great importance, on which I give no opinion, as it does not arise in this case. I am of opinion, on the whole, that the judgment should be affirmed. Judgment affirmed.

## CHILDS v. BANK OF THE STATE OF MISSOURI.

1852. 17 *Missouri*, 213.

CHILDS brought an action under the new code, alleging that the defendant had falsely accused, and caused him to be accused of embezzlement, and upon this charge had unjustly and maliciously, and without probable cause, caused him to be arrested and imprisoned; that under color of a search warrant, the defendant had obtained possession of certain valuable papers and evidences of debt belonging to the plaintiff; that the defendant had caused the dwelling house of plaintiff to be beset by armed men by day and by night, thus restraining the plaintiff and his family of their liberty, and interrupting their intercourse with their friends; and that the defendant had falsely and maliciously caused the plaintiff to be indicted and prosecuted; for all which grievances, the plaintiff claimed damages to the amount of fifty thousand dollars.

A demurrer to this petition was sustained, and the cause is brought to this court by writ of error.

*Edward Bates*, for plaintiff in error. The bank, as a corporation, was legally capable of doing all the wrongs charged in the petition; but if capable of doing any one of them, it was erroneous to sustain the demurrer. Our statute law puts corporations and private persons on the same footing. R. C. 1845, ch. 101, § 10. Our statute of set-off is not restrained to natural persons. *City of St. Louis v. Rogers*, 7 Mo. R. 19. The federal courts consider corporations as the mere aggregate of the individual members, and take or refuse jurisdiction accordingly. *Hope Insurance Co. v. Boardman*, 5 Cranch, 57. *Bank v. Deveaux*, ib. 61. *Bank U. S. v. Planters' Bank*, 9 Wheat. 904. *Kirkpatrick v. White*, 4 Wash. C. C. R. 595. A money corporation may commit a trespass, and it is sufficient to charge the corporation as a trespasser, that its president ordered the sheriff to execute a writ. *Ford v. Perpetual Insurance Co.*, 11 Mo. Rep. 295. In the nature of things, corporations are as capable of doing wrongful acts, as private persons are, and justice requires that they should be held responsible for them in the same way; and this is the settled doctrine of the com-

mon law. *Yarborough v. Bank of England*, 16 East, 6. *Parsons v. Loyd*, 3 Wilson's Rep. *Goodloe v. Cincinnati*, 4 Ohio, 513. 4 S. & R. 6. Angell & Ames on Corporations, (3d ed.) 385, § 7, and especially p. 391.

*Miron Leslie*, for defendant in error. It is physically and legally impossible that a corporation, as such, can maliciously prosecute, or wilfully slander any one. Kyd on Corporations. Bacon's Ab. 4 Serg. & R. 6. 16 East, 6. 20 Maine Rep.

RYLAND, Judge, delivered the opinion of the court.

1. The difficulty under which we have labored in this case, was to classify the action. It is brought under the new code. If it were an action of slander, we should at once say that it could not be maintained. The bank is a corporation — it cannot utter words — it has no tongue — no hands to commit an assault and battery with — no mind, heart or soul to be put into motion by malice; therefore, if it was an action for an assault and battery, or for a malicious prosecution, or for slander, we should at once say, that such could not be maintained. Yet the doctrine is well settled that corporations are now liable for torts, in some cases, in the same manner as persons individually are. •The bank of England has been sued in trover and the action sustained. Many corporations have been sued for the misfeasance or malfeasance or negligence of their servants or agents. Yet I have not been able to find where a public or private corporation was sued, either for slander, malicious prosecution, false imprisonment or for assault and battery, and the action held maintainable. In the nature of things, manifest injustice might follow from allowing such actions. In such corporations, the majority of the incorporators rule and manage the affairs, appoint agents, officers and servants, and direct their conduct.

Suppose the majority of directors of a bank should, by a vote, order one of its servants to strike a man, or to have a man accused of larceny, and have him arrested and imprisoned; these acts were ordered to be done by a majority, against the votes and wishes of the minority. Now let the corporation be held liable to be sued as such, and the innocent must suffer with the guilty, the non-offending with those directing and ordering the injury. This cannot be. In 20 Maine Rep. 43, *State v. Great Works Milling and Manufacturing Co.*, it is said by Chief Justice Weston, "a corporation is created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor by any positive or affirmative act, or incite others to do so as a corporation. It is a doctrine in conformity with the demands of justice and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business and not the corporation should be indicted." In 1 Ohio Rep. 28, *Orr v. Bank of United States and others*, one of the questions was, "whether a corporation aggregate is liable to be sued by its corporate name, in an action of trespass for an assault and battery and false imprisonment." In this case, Judge Burnet delivered the

opinion of the court. He reviewed the cases from the earliest reporters, Thorp's opinion in 22 Ass. 67, down to 12 Johns. 227; 14 Johns. 118; 7 Mass. 169; 16 East, *Yarborough v. Bank of England*; 7 Cranch, 299; and concludes on this point thus: "On the whole, whatever exceptions may exist to the rule, that actions of trespass generally do not lie against corporations, it is evident that the action now under consideration cannot be one of the exceptions, and therefore that it cannot be sustained against the bank."

"An action for an assault and battery committed on a corporation aggregate in their corporate character, would be a novelty in judicial proceedings; and yet it appears to be as contrary to reason and common sense, that they should be the agents in such a trespass, as it is that they should be the objects of it." Malicious prosecution—false imprisonment—slander, must all come within the principles of these decisions. The persons doing the deed are liable individually, not the corporation. We therefore think in this action, that the court below properly sustained the demurrer.

[The court then intimated that, although, under the new code, a plaintiff may unite in his petition as many causes of action as he may have, yet each cause should be distinctly and separately stated. The opinion concludes as follows:]

Upon the whole of the matter set forth in the petition, it is to be seen, that if such things did take place as therein charged against the bank, its servants or agents or officers may be responsible to the persons injured, and against such the law affords a remedy.

The judgment below should, then, be affirmed, and such being the opinion of Judge Scott, (Judge Gamble not sitting in this cause,) it is affirmed accordingly.

## EASTERN COUNTIES RAILWAY CO. v. BROOM.

1851. 6 *Exchequer*, 314.<sup>1</sup>

IN the Exchequer Chamber. Error on a bill of exceptions. Broom sued the Railway Company and one Richardson in trespass for assault and imprisonment. There was a verdict for plaintiff. One question argued on the bill of exceptions was, whether an action of trespass for assault and battery will lie against a corporation aggregate. The alleged assault and imprisonment were the acts of one Richardson, a servant of the Railroad Company, committed in the course of his attempt to enforce certain by-laws of the Company relative to passengers' delivering up tickets and paying fares.

<sup>1</sup> Only so much of the case is given as relates to one point; and the statement as to that point is abridged. — Ed.

*Willes*, for plaintiff, in error.

First, trespass for assault and battery does not lie. This objection is open to the plaintiffs in error in arrest of judgment, as it arises on the pleadings. It may be admitted, that in some cases trespass lies against a corporation aggregate; as, for instance, trespass for taking goods, but there the matter falls within the original scope of their powers: *Maund v. Monmouthshire Canal Company*, 4 M. & Gr. 452.<sup>1</sup> For a corporation has authority to deal with property. But it cannot be said that the commission of a tort by a trespass to the person falls within their duties. In 1 Blac. Com. 476, it is said, that a corporation "can neither maintain nor be made defendant to an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic;" and reference is made to Br. Abr. tit. "Corporation," 63. So in Vin. Abr. tit. "Corporations" (P.) 2, it is laid down, that "trespass does not lie against commonalty, but shall be brought against the persons by their proper names;" and it is also stated in the same work, that "a corporation cannot be beaten in their corporate but in their natural body; nor a corporation cannot beat another, nor do treason or felony in their corporation:" Vin. Abr. "Corporations" (Z.) 2; and the same proposition of law is laid down in the Year Book, 21 Edw. 4, 7, 12, &c. [MAULE, J. — That must be taken to mean, that a corporation is not liable *criminaliter* for such acts.] In 1 Kyd on Corporations, p. 71, the proposition is broadly laid down: "Neither can it do or receive a personal injury; and therefore can neither sue nor be sued in an action of trespass for battery or false imprisonment." A corporation is indictable for non-performance of such matters as are cast upon them by law, and which therefore fall within the scope of their duties. In *Reg. v. The Birmingham and Gloucester Railway Company*, 3 Q. B. 223,<sup>2</sup> a corporation aggregate was indicted for disobedience to an order of justices, requiring them to execute certain works according to a statutory provision. The following cases proceeded upon the principle within which the plaintiffs in error contend their case falls: *Reg. v. The Great North of England Railway Company*, 9 Q. B. 315.<sup>3</sup> In *The King of the Two Sicilies v. The Peninsular and Oriental Steam Packet Company*, 19 L. J., Chanc., 488, the Vice-Chancellor expressed an opinion that the defendants, a corporation, could not be indicted under the Enlistment Act. [WIGHTMAN, J. — If a corporation can hold realty, why may not they commit an assault by turning a trespasser off their land? Their answer to an action would be, that although they committed the assault, it was committed in the defence of their property.] In the recent case of *Chilton v. The London and Croydon Railway Company*, 16 M. & W. 212, the plaintiff succeeded in an action of trespass and assault against the Company, but the present objection was not raised. [MAULE, J. — Is it not still open to them?]

<sup>1</sup> E. C. L. R. vol. 56.

<sup>2</sup> Id. 30.

<sup>3</sup> Id. 5.

Secondly, if this action lies against a corporation aggregate, the agent by whom the trespass is committed on their behalf must be duly authorized to commit it by deed, under the common seal of the Company. An assault is not an every day act, which a corporation may direct without the intervention of a solemn instrument. [PARTESON, J. — I think it doubtful whether this point is open upon this bill of exceptions: no objection of the kind was made.] It was objected, that there was no sufficient evidence to render the Company liable. [PARTESON, J. — We are all agreed that there is no necessity for the corporate seal.]

*Watson, contra.* — The proposition, that an action of trespass for an assault does not lie against a corporation, is untenable in the present age. There is no satisfactory reason to be given why the dicta to be found in the old cases should apply to the present. It has been held, that trespass *quare clausum fregit* and for taking goods lies against a corporation: *Maund v. The Monmouthshire Canal Company*. There is no distinction between injury to the person or to property as affects this question. The argument of the plaintiffs in error is reduced to this, that a corporation cannot commit a trespass, except when they may justify it. But surely a corporation may justify acts done by their authority in the protection of their property. The servants of a Railway Company may remove trespassers; by the same rule, if the removal be wrongful, the Company may be liable for it. Many absurdities would ensue if this were not so. Upon that principle, a Company would not be liable for accidents occasioned by the negligence of their servants, as in the case where a party is injured by a collision. The true rule is laid down by PARKE, B., in delivering the judgment of the Court of Exchequer in *Sharrod v. London and North Western Railway Company*, 4 Exch. 585. The old authorities may be disposed of on the ground that a corporation aggregate is not liable *criminaliter* for the acts of its servants. The propositions in the text books cited have been founded upon a misconstruction or an improper extension of the opinion laid down in the Year Books. If the rule be correct, that a person has a remedy against the Company for the loss of his goods, he has a like remedy for an assault committed against him in the defence of those goods. His remedy against the servant might be of no value whatever to him, as he might be insolvent. It is clear that, on the one hand, it is necessary to the existence of these Companies, that they should have the power of enforcing such rules and regulations as are necessarily required for carrying on the traffic; and on the other hand, it is equally essential that the personal safety and comfort of the public should be rightly defended. In *Reg. v. The Great North of England Railway Company*, 9 Q. B. 326,<sup>1</sup> Lord DENMAN, C. J., said, “The Court of Common Pleas lately held, that a cor-

<sup>1</sup> E. C. L. R. vol. 58.



poration might be sued in trespass, but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which has no such duties, cannot be guilty in these cases; but they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large."

PATTESON, J. — I have conferred with my learned Brothers upon this case, and we are all of opinion that there is no reason why we should defer our judgment. The first question arises on the declaration itself, and is quite independent of the particular circumstances of this case. It is alleged, on the part of the plaintiffs in error, as a general broad proposition of law, that in no case can an action of trespass for assault and battery lie against a corporation aggregate. Whatever may be the effect of the authorities in the Year Books, it has been expressly held, in modern times, that trespass will lie against a corporation aggregate for breaking and entering a close, and for seizing goods. This has been decided by several recent cases. Then the question is, whether trespass for assault and battery may lie against a corporation; and it has been contended that it cannot; for it is said, that it can neither beat nor be beaten. No doubt that proposition is true of it as respects its corporate capacity. But it does not therefore follow, that if a corporation, by authority under seal, direct a servant to apprehend and imprison a particular person, an action for assault and battery cannot be maintained against the corporation. The learned counsel who appears for the plaintiffs in error must contend, in order to show that this declaration cannot be supported, that no such action would lie. But we are all clearly of opinion that it is not so, and that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act done, and it is done by their authority. We are therefore of opinion that the declaration is good: and we do not think it necessary to go through the several authorities upon this question. The next question is, whether, in order to render the corporation liable for the act of their servant, it was necessary that that servant should have an authority by deed. It has been decided, many years ago, that a corporation may be liable in tort for the acts of their servants, although their authority be not under seal. It is not necessary, therefore, further to advert to this point.

[The Court then *held*, that there was no sufficient evidence that any previous direction was given by the Company to its servants to enforce the by-laws in the manner here attempted; and also *held*, that there was no sufficient evidence of ratification by the Company. On these grounds it was adjudged that there must be a *venire de novo*.]

## PHILADELPHIA, W., &amp; B. R. R. CO. v. QUIGLEY.

1858. 21 *Howard (U. S.)*, 202.<sup>1</sup>

ERROR, to the U. S. Circuit Court for the District of Maryland.

Quigley sued the P. W. & B. R. R. Co. for the publication of a libel by them. Defendants pleaded the general issue.

An investigation was made by the directors into the conduct of the superintendent, including the dealings of the superintendent with the plaintiff, who had also been in the service of the company. In the course of this investigation, the president addressed a letter to an architect, requesting his opinion as to the skill of plaintiff and the value of plaintiff's services. The reply was depreciative of the plaintiff. All the testimony collected by the committee was reduced to writing and printed; first for the use of the president and directors, and afterwards was submitted to the company at their meeting. The testimony, with the report of the committee, fills two printed volumes. The letter of the architect, in answer to the letter of the president, is printed in one of these volumes, and this publication is the libel complained of.

A verdict was returned for the plaintiff.

*Schley*, and *Donaldson*, for plaintiffs in error.

*Johnson*, and *Davis*, for defendant.

CAMPBELL, J. [After stating the case.] The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the States of the Union relative to these artificial persons. Legislation has

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings — mere legal entities, which exist only in contemplation of law — to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives.

With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety. — *Trespass quare clausum fregit* was supported in 9 Serg. and R. 94; 4 Mann. and G. 452; Assault and Battery, 4 Gray Mass. R. 465; 6 Ex. Ch. 314. For damages by a collision of rail-cars and steamboats, 14 How. 465; 19 How. 543. For a false representation, 34 L. and Eq. R. 14; 11 Wheat. 59.

The case of the National Exchange Co. of Glasgow v. Drew, (2 Macqueen H. of L. Cas. 103,) was that of a company in failing circumstances, whose managers sought to appreciate its stock by a fraudulent representation to the company, and a publication of the report as adopted by it, that its affairs were prosperous. Two of its stockholders were induced to borrow money from the company to invest in its stock. The question in the cause was, whether the company was responsible for the fraud. In the house of lords, upon appeal, Lord St. Leonards said: "I have come to the conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of stock, and they induce a third person to purchase stock, those representations so made by them bind the company. I consider repre-

sentations by the directors of a company as representations by the company, although they may be representations made to the company." . . . The report "becomes the act of the company by its adoption and sending it forth as a true representation of their affairs; and if that representation is made use of in dealing with third persons, for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those representations."

It would be difficult to furnish a reason for the liability of a corporation for a fraud, under such circumstances, that would not apply to sustain an action for the publication of a libel.

The defendants are a corporation, having a large capital distributed among several hundred of persons. Their railroad connects large cities, and passes through a fertile district. Their business brings them in competition with companies and individuals concerned in the business of transportation. They have a numerous body of officers, agents, and servants, for whose fidelity and skill they are responsible, and on whose care the success of their business depends. The stock of the company is a vendible security, and the community expects statements of its condition and management. There is no doubt that it was the duty of the president and directors to investigate the conduct of their officers and agents, and to report the result of that investigation to the stockholders, and that a publication of the evidence and report is within the scope of the powers of the corporation.

But the publication must be made under all the conditions and responsibilities that attach to individuals under such circumstances. The court of queen's bench, in *Whitefield v. South Eas. R. R. Co.*, (May, 1858,) say: "If we yield to the authorities which say that, in an action for defamation, malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill will to the plaintiffs, and did not mean to injure them." And the court concluded: "That for what is done by the authority of a corporation aggregate, that a corporation ought as such to be liable, as well as the individuals who compose it."

The question arises, whether the publication is excused by the relations of the president and directors, as a committee from their board, to the corporation itself. It cannot be denied that the inquiries directed by those officers were within the scope of their power, and in the performance of a moral and legal duty, and that the communication to their constituents of the evidence collected by them, and their conclusions upon the evidence, was a privileged communication in the absence of any malice or bad faith. But the privilege of the officers of the corporation as individuals, or of the corporate body, does not extend to the preservation of the report and evidence in the permanent form of a book for distribution among the persons belonging to the corporation or the members of the community. It has never been decided

that the proceedings of a public meeting, though it may have been convened by the authority of law, or of an association engaged in an enterprise of public utility, could be reported in a newspaper as a privileged publication. But a libel contained in such proceedings, if preserved in the form of a bound volume, might be attended with more mischief to private character than any publication in a newspaper of the same document. The opinion of the court is, that in so far as the corporate body authorized the publication in the form employed, they are responsible in damages. The circuit court instructed the jury:

1. [The first instruction authorized the jury to find a verdict against defendants upon evidence of a publication which took place after the commencement of this suit.]

2. And if the jury find for the plaintiff under the first instruction, they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to plaintiff, and act as an adequate punishment to the defendant.

The first instruction is erroneous, because the publication to which the court referred as blameworthy, and to authorize the jury to find a verdict against the defendant, took place after the commencement of this suit.

The second instruction contains the same error, and is objectionable for the additional reason that the rule of damages is not accurately stated to the jury.

In *Day v. Woodworth*, 13 How. S. C. R. 371, this court recognized the power of a jury in certain actions of tort to assess against the tort-feaser punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants.

The letter of Mahoney was reported to the company with other evidence that rendered it innocuous, and its statements were never adopted by them. The plaintiff has repeatedly affirmed that he had derived an advantage from the investigation by the company, and, upon reading all the evidence, as reported and published, we do not perceive how an impression unfavorable to him could have been made by it upon any candid mind. The circumstances under which the evidence was collected, and the publication made, repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed.

[Omitting part of opinion.]

For the errors we have noticed, the judgment of the circuit court is reversed, and the cause remanded.

DANIEL, J., delivered a dissenting opinion; holding that there should be added to the reversal of the judgment of the circuit court an order for a dismissal of the suit.

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GREEN v. LONDON GENERAL OMNIBUS CO. (LIMITED).

1859. 7 *Common Bench, New Series*, 290.

THIS was an action against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

The declaration stated, that, before and at the time of the committing the grievances thereafter mentioned, the plaintiff carried on the trade and business of a carrier of passengers for hire in certain public streets, roads, and highways, to wit, &c., by means of certain omnibuses of the plaintiff drawn by horses and driven and conducted by the servants of the plaintiff, for the profit and benefit of the plaintiff, and which said omnibuses of the plaintiff had full liberty and right to run respectively from, &c., to, &c., and to stop for a reasonable time at all points and places on and along the said public streets, roads, and highways, for the purpose of taking up and putting down passengers, and at certain points and places in the said streets, roads, and highways where numerous passengers were accustomed to enter the omnibuses passing such points and places, the said omnibuses of the plaintiff and all other omnibuses passing that way were, by the police regulations then lawfully enforceable and enforced, permitted to wait for a certain space of time, to wit, for the space of four minutes, to look for passengers, unless by their so doing any actual obstruction to the thoroughfares or nuisance to the inhabitants near the places was caused thereby: Yet the defendants, well knowing the premises, but contriving and intending to injure, impoverish, and ruin the plaintiff, and to prevent him from carrying on his said business, at divers times before this suit, *wrongfully, vexatiously, and maliciously* placed and drove in the public streets, roads, and highways aforesaid, certain other omnibuses and carriages just before and just behind the said omnibuses of the plaintiff, whilst the same, with the plaintiff's horses drawing the same, were plying for passengers for hire in the public streets, roads, and highways as aforesaid, and with which the plaintiff was then carrying on his said business, in such a manner as to hinder and prevent, frighten, and deter great numbers of persons from entering the plaintiff's said omnibuses and becoming passengers therein for hire, as they otherwise might and would have done, and so as to hinder and prevent

the plaintiff from having the free use of the said streets, roads, and highways with his said omnibuses and horses in so large and ample a manner as he otherwise might and would have done, and so as to retard, delay, and stop the said omnibuses of the plaintiff, and so as greatly to obstruct and encumber the said highways, to the nuisance of the Queen's subjects then lawfully using the same: And further the plaintiff said that the defendants *wrongfully, vexatiously, and maliciously* drove and placed in the public streets, roads, and highways aforesaid, certain other carriages and omnibuses upon and against the said omnibuses and horses of the plaintiff, and upon and against the servants of the plaintiff then conducting the same, while the said omnibuses, with the plaintiff's horses harnessed to the same, and the plaintiff's said servants conducting the same, were plying and waiting for passengers for hire in the public streets, roads, and highways aforesaid, and with which the plaintiff was then carrying on his said business as aforesaid, in such a manner as thereby to bruise, damage, and injure the said omnibuses and horses of the plaintiff, and to prevent the doors of the said omnibuses from being opened, and to obstruct and block up the access of passengers into the said omnibuses of the plaintiff, and to hinder and disable the said servants of the plaintiff from freely and fully performing their duties to the plaintiff in the conduct and management of the said omnibuses of the plaintiff, and whereby they were so hindered and disabled as aforesaid accordingly: And the plaintiff further said that the defendants also, contriving and intending as aforesaid, at the several times aforesaid also *wrongfully, vexatiously, and maliciously*, in the said public streets, roads, and highways, thrust and pushed themselves, and caused their servants to and they did thrust, push, and place themselves between the said omnibuses of the plaintiff while plying and waiting for passengers as aforesaid in the way of the plaintiff's said business, and divers persons who were desirous to enter and get into and on to the same as passengers for hire, so as thereby to obstruct the entrance and access of such passengers into and upon the said omnibuses of the plaintiff, and to hinder, deter, and prevent them from entering the same or becoming passengers therein: And further, in continuation of this count, the plaintiff said that the defendants also contriving and intending as aforesaid, at the several times aforesaid, *wrongfully, vexatiously, and maliciously* insulted, hissed and assaulted, beat, and ill-used the plaintiff's servants in the said public streets, roads, and highways, while they were employed in driving, conducting, and managing the said omnibuses in the way of the plaintiff's said business, and were plying and waiting for passengers therewith in the said public streets, roads, and highways: And in continuation of that count the plaintiff further said that the defendants, well knowing the points and places in the said respective roads at which the plaintiff's omnibuses, by the said police regulation in the introductory part of that count mentioned, were permitted to remain for a certain space of time, to wit, for the space of four minutes as

aforesaid, *wrongfully, maliciously, and vexatiously*, and for the express purpose of annoying the plaintiff and causing such an obstruction of the thoroughfares at the said points and places in the said public streets and roads as aforesaid as would induce and oblige the police there stationed to order off the omnibuses of the plaintiff from the said points and places before the said omnibuses had remained at the said points and places for the said space of time which by the police regulations aforesaid they were permitted to remain, and thereby to prevent passengers who, if the plaintiff's omnibuses had so remained, would have come and entered into and mounted upon the plaintiff's said omnibuses, from so doing, caused one or more of their, the defendants', omnibuses, drawn by their horses, and driven and conducted by their drivers and conductors, to precede and follow each omnibus of the plaintiff as such omnibus approached near to and arrived at each or any of the said points and places in the said public streets, roads, and highways, in such a manner as to cause such an obstruction to the thoroughfares at such points and places, and such a nuisance to the inhabitants near the said points and places, as would induce and oblige, and which did induce and oblige, the police there stationed to order and command that the plaintiff's omnibuses should move off from the said points and places in the said public streets, roads, and highways, before they had remained there for that space of time which but for the defendants' wrongful contrivance and conduct they otherwise might and would have done, and thereby they the defendants prevented numerous passengers from entering and riding upon the plaintiff's said omnibuses for hire, as they otherwise might and would have done: by reason of which said several grievances in that count respectively mentioned, great numbers of persons were on the several days and times aforesaid hindered, deterred, and prevented from becoming passengers for hire by the plaintiff's said omnibuses, as they otherwise would have done, and the plaintiff's omnibuses and horses were greatly injured, &c., and the plaintiff was greatly damaged, hindered, and obstructed in carrying on his said business, &c., &c.

To this declaration the defendants demurred; and the plaintiff joined in demurrer.

*Giffard* (with whom was *Paterson*), in support of the demurrer. — The declaration alleges a variety of malicious acts done by the company with the intention of obstructing and injuring the plaintiff in carrying on his trade. Now, the gist of the action is the malicious intention; and a corporation cannot as such be actuated by malice. A corporation, according to Lord Coke, — *Sutton's Hospital Case*, 10 Co. Rep. 32 b, — "cannot treason, nor be outlawed, nor excommunicate, for they have no souls; neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty. A corporation aggregate of many cannot do fealty, for, an invisible body can neither be in person, nor swear: *Plowd. Comm.* 213, and the *Lord Berkeley's Case*, 245: it is not subject to imbecilities, death of the natural body, and divers other cases."



The question is how far the old rule of law in this respect is modified by the recent decisions upon the subject. The most recent authority on the point is that of *Whitfield v. The South Eastern Railway Company*, 1 Ellis, B. & E. 115 (E. C. L. R. vol. 96), where it was held that a count against a railway company, being a corporation aggregate, for a malicious libel, is good on demurrer; for that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice *in law* sufficient to support the action. But there the judgment proceeded upon the ground that the occasion did not justify the publication, and therefore the law would infer malice.

[After distinguishing *Eastern, &c., R. Co. v. Broom*, 6 Exch. 314, the argument proceeds:]

All the acts that are here attributed to the company are acts which are necessarily *malicious*. The plaintiff must show that he has been injured by the defendants placing their omnibuses before and behind his *maliciously*. Apart from malice, there is no cause of action. The company in its corporate capacity could not authorize acts which are necessarily unlawful and malicious. The mere obstruction by the defendants of the plaintiff's enjoyment of a public way gives no ground of action: he must show a private and particular damage from an act of the defendants which is intentionally malicious or unlawful: *Hubert v. Groves*, 1 Esp. N. P. C. 148; *Rose v. Miles*, 4 M. & Selw. 101; *Wilks v. The Hungerford Market Company*, 2 N. C. 281 (E. C. L. R. vol. 29), 2 Scott 446 (E. C. L. R. vol. 30). Here, the plaintiff has suffered no grievance which is peculiar to himself. [BYLES, J. — What is the meaning of *maliciously*? ERLE, C. J. — A wilful violation of the law producing damage to an individual, must be presumed to be malicious.] To sustain this declaration, the plaintiff must show some wilful and unlawful and unauthorized interference by the defendants with some private right. [*Grant, Amicus Curie*, referred to the Quo warranto in *Rex v. The City of London*, 8 Howell's State Trials 1039, 1305, 1309, where the subject of malice in a corporation is much discussed. CROWDER, J. — Would this declaration be bad without the allegation of malice? Does the allegation mean anything more than wilful?] It is submitted that the whole gist of the action is the malice. The defendants could not justify the specific acts charged without justifying the malicious intention: *Gregory v. The Duke of Brunswick*, 6 M. & G. 205 (E. C. L. R. vol. 46), 6 Scott N. R. 809.

*F. Edwards*, contrà. [Argument omitted.]

*Giffard*, in reply. [Argument omitted.]

*Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court: —

We are of opinion that our judgment in this case ought to be for the plaintiff. This is an action against the defendants for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights, by causing their vehicles to be driven in such a manner as to obstruct and

molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer is that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles; and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies: and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough v. The Bank of England*, 16 East 6, down to *Whitfield v. The South Eastern Railway Company*, 1 Ellis, Bl. & E. 115 (E. C. L. R. vol. 96), — which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. *Giffard*, — that a corporation, having no soul, cannot be actuated by a malicious intention, — is more quaint than substantial. In coming to the conclusion we arrive at, we have no intention in the smallest degree to interfere with any of the decided cases; but, on the contrary, we found our judgment upon the numerous class of cases of which *Yarborough v. The Bank of England*, — where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities, — is by no means the first, and which afford abundant examples of the application of the principle we now rely on. We may add that we dwell the less upon the grounds which have been urged by Mr. *Giffard* against the maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies incorporated for the purpose of carrying on trade were exempt from liability for intentional acts of wrong. We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons, we are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

## GOODSPEED v. EAST HADDAM BANK.

1853. 22 *Connecticut*, 530.<sup>1</sup>

CHURCH, C. J. This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case, for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced, by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff, by his evidence had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court, in granting the nonsuit, as we understand, was founded solely upon the ground, that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration; at least, no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume, that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury, is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round, to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private, — that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged, that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its conse-

<sup>1</sup> Statement and arguments omitted. — Ed.

quences, as it tends to introduce actual wrongs and ideal remedies ; for a turnpike company might do great injury, by means of laborers having no property to answer damages," &c. 4 Serg. & Rawle, 16. To the same effect is the language of Shaw, C. J., in the case of *Thayer v. Boston*, 19 Pick., 511. He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible, practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company*, 7 Wend., 31. There, as here, it was contended, that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last half century, has been in a progress of development, so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages ; now, volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this ; but we say, that, as new relations, from this cause, are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied.

And so, in the course of this progress, it has been. It was said by Lord Coke, "that corporations had neither souls nor bodies ;" and by somebody else, "that they had no moral sense ;" and from thence, or some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs ; that they act, not only upon pecuniary concerns ; but, as having conscience and motives, to an almost unlimited extent, they are entrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers, regarding the real nature, power, and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed, that now, these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered, why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures, for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. *Yarborough v. Bank of Eng.*, 16 East, 6. *Beach v. Fulton Bank*, 7 Cowen, 436. *Foster v. Essex Bank*, 17 Mass., 503. *Riddle v. Proprietors of Locks and Canals*, 7 *id.*, 187. *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & Rawle, 16. 4 Hammond, 500, 514. 10 Ohio Rep., 159. *Dater v. Troy Turnpike Co.*, 2 Hill, 630. 23 Pick., 139. 2 Bl. Com., 476. Ang. & Ames, 392. 2 Kent Com., 290. 1 Sw. Dig., 75. 15 Ohio Rep., 476. 18 *id.*, 229. And indeed, no actions are now more frequent, in our courts, than such as are brought against corporations, for torts, either in case or trespass. *Hooker v. New Haven & Northampton Canal Co.*, 14 Conn. R., 146, and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. *Eastern Counties Railway Co. v. Brooks*, 2 Eng. Law & Equity, 406. And it was decided long ago, that a corporation was liable to an action, for a false return to a writ of *mandamus*, alleged to have been made falsely and *maliciously*. 16 East, 8. 14 Eng. Com. Law, 159. 3 Mees. & Wels., 244. Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden, that corporations may be subjected to civil liabilities for torts, the acts charged as such, have been the acts of their constituted authorities, either the directors, or agents, or servants, employed by them. We do not intend here to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person, or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit, that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of, as vexatious, was instituted by the *bank*, in the name of the bank, and, as should be presumed, in

just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought, for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank, in its corporate capacity. The bank, by its charter, and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, sec. 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing to show, that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus v. Cricket*, 1 East, 106; *Wright v. Wilcox*, 19 Wend., 343; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comstock, 470; but denied by Chief Justice Reeve, in his *Domestic Relations*, 357, we think has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority, — persons whose duty it is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation, — the representatives, standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Burrell v. The Nahant Bank*, 2 Met., 163, Shaw, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says: "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform, as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, *the corporation*. We think they do not exercise a delegated authority, in the sense to which the rule applies to agents and attorneys," &c. The same principle is very distinctly recognized, in the cases of *Bank Commissioners v. Bank of Buffalo*, 6 Paige's Ch., 502, and *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend., 31. It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act, — and this is only in the choice of directors, and no more. Beyond this, they can only be considered, as the persons

for whose ultimate individual interests the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent, be true; but the protection of the law in this matter, is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be, — that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it can not be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it can not act from malice, and therefore, can not commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one, — they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, is a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases, of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff can not, in some legitimate way, prove the malice he has alleged, he can not recover; but we have no right to assume it as a legal principle, that it can not be proved. We do not

know that it has ever been adjudged, that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges, is evidence of malice, and which must, as in this case, be proved. But, would it be endured, that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason, than that a corporation is only an ideal something, of which malice or intention can not be predicated? And if, as we have suggested, the directors are, for all practical purposes, *the corporation* itself, acting, at least, as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure, that this objection of the defendants, was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation, felt, when the case of *Merrills v. The Tariff Manufacturing Co.*, 10 Conn. R., 384, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation, for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion, that the nonsuit granted by the superior court, should be set aside, and a new trial granted.

In this opinion, WAITE, J., concurred.

ELLSWORTH, J. I do not feel quite satisfied, that the plaintiff can recover against the defendants, for a malicious suit brought, in fact, by the directors of the bank. Certainly, no such action has been found in the books, though I admit there are analogous cases which show, that courts have gone very far in subjecting corporations for wrongs, by their agents, but I think there are none, going to the extent now claimed.

An indispensable requisite, in an action for a malicious suit, is *malice*, — malice in *fact*, — a wicked criminal purpose. An unsuccessful suit is not sufficient. It must have originated in malice; and this idea of



*actual*, as contradistinguished from legal, malice, is, in my judgment, deserving of the highest consideration. It gives character to the action. The language of Greenleaf, 2 Greenl. Ev., 367, is, "To sustain this averment, (malice,) the charge must be shown to have been wilfully false. Now I ask, in view of this essential requisite, if any such malicious intent can be said to belong to a body of stockholders, (the corporation,) whose affairs are conducted by their agents, under the provisions of the charter of the company, and who, themselves, are in no way or manner *really* implicated in the supposed malicious intent? Again, I ask, whose malice is the ground of the action? not the malice of the president and cashier, — not that of the directors; this is not even admissible in proof against the company. Whose malice then? certainly not that of the ideal corporation; for this is a mere fictitious entity, and can not entertain malice. It must never be forgotten, that malice, as already said, is the very *ground* and gist of the action, and no case has been read to us, of a recovery against a corporation, where there was not a perfect cause of action, independent of any malicious intention. Doubtless the directors may be guilty of malice, and of a malicious injury; but to proceed further, and subject stockholders, for their malice, is quite another question.

It is likewise to be kept in mind, that this action does not belong to that class of actions against corporations, or other principals, for injuries sustained, through a false confidence reposed by strangers in the supposed authority of agents. This action is for an original unauthorized wrong of the directors, and is in no way the result of any false confidence. It is a mere malicious contest between the directors themselves. The stockholders may well say: We can not be involved in this malicious contest. We entertain no malice against Mr. Goodspeed, and no one can entertain it for us.

I think it has been incorrectly assumed, by counsel, that the malicious suit was brought by the East Haddam Bank. It was, in fact, brought by the major vote of the directors. *They* made use of the company name, for *their own malicious* purpose, while they were only intrusted with the powers delegated, for a lawful and laudable purpose. The company do not at all admit, that they are represented in this instance, — no more than they would, had the directors voted that the cashier should inflict personal chastisement upon Mr. Goodspeed, wherever he could find him.

But if this objection is unsound and capable of being surmounted, there is still another, by no means to be overlooked. The act of the defendants is conceded to be wilful and designed; indeed, this is the very ground of the action — *a malicious wrong*. No principle of law is better settled, than that the principal is not liable for the intentional torts of the agent. For his negligence he is liable, but nothing more. To go beyond this, and make him liable for criminal conduct, though in a civil form, would jeopardize the safety of all employers, whether corporations or others, or would prevent the employment of all agents,

because of the great responsibility. It may be politic, to hold principals to greater carefulness on the part of their agents, or servants, but this is all that has hitherto been found expedient or necessary. If now this admitted rule of law, as a general rule, is to be applied to this case, it puts an end to the controversy at once; for a more palpable or wilful wrong, or tortious act, cannot be imagined, than the officers of a bank maliciously and without cause, using the corporate name to oppress or destroy a fellow-director. Of course, I do not say this is so, in this instance; but the plaintiff makes this assumption, in order to recover on this declaration. That the above principle of law *is* applicable to corporations, as well as to other principals, who employ agents, is most learnedly argued and fully decided in the court of appeals of the state of New York. *Vanderbilt v. The Richmond Turnpike Co.*, 2 Com., 481, which was the case of an intentional collision of steamboats in the harbor of New York.

Suppose, in the late catastrophe at Norwalk, the engineer had designedly run the train into the creek, to sink a steamboat passing underneath; would the company have been liable to the owners of the steamboat? True, they would have been liable to the passengers in the cars, because they undertook to carry them safely to the end of the route; but there is no such undertaking, as to strangers. Suppose the engineer had intentionally run over a man on the road, to break his bones; would the company be liable? Suppose the president and directors had themselves conducted the engine with the same intention, and had done the same injury, would the company be liable? Is a town liable for a malicious suit by its selectmen? or a savings bank, for the malicious conduct of its trustees? I answer, in all these cases, no.

It is asked, will you not hold corporations to the same rule of justice and law, as you do all others? I answer, yes, where the cases are parallel. Now, this interrogatory assumes two things, which are not entirely clear or conceded, *viz.*, that you can pass by the only actual malice in the case, and assume malice in the stockholders, or corporation, who are avowedly ignorant and innocent; and further, that the principal is liable for the wilful wrongs perpetrated by his agent. Now, I go for the same rule to all, and therefore, I hold, that those who, in fact, do the wrong, must answer for it. If a different view of the case is taken, and corporations are held liable for the malicious acts of the directors, and other inferior agents, I insist, that a different rule is made to apply to them from others, and that the property of stockholders, vested under the exact limits and provisions of the charter, will be subjected to very great and alarming hazards.

These are, briefly, my views, expressed with no little distrust, since some of my brethren feel well satisfied the plaintiff is entitled to recover.

In this opinion, HINMAN, J., concurred. STORRS, J., having tried the cause in the court below, was disqualified.

Nonsuit set aside, and new trial to be granted.

## LAKE SHORE, &amp;c. R. CO. v. PRENTICE.

1893. 147 U. S. 101.<sup>1</sup>

ERROR to the U. S. Circuit Court for the Northern District of Illinois.

Action of trespass on the case, by Prentice against the Railway Company, for the unlawful arrest of the plaintiff, by order of the conductor of the train upon which plaintiff was a passenger.

At the trial, and before the introduction of any evidence, the defendant admitted that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor. The evidence tended to prove that the arrest was publicly made, and in a manner especially insulting and humiliating to the plaintiff.

The Circuit Judge instructed the jury as to damages (in part) as follows:—

If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish.

“I am not able to give you any rule by which you can determine that; but bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit.

“And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called smart money, if you are satisfied that the conductor’s conduct was illegal (and it was illegal), wanton and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant.

“If a public corporation, like an individual, acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power.”

The jury returned a verdict for the plaintiff in the sum of \$10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of \$4000, and asked that judgment be entered for \$6000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for \$6000. The defendant sued out this writ of error.

*George C. Greene*, for plaintiff in error.

*W. A. Foster*, for defendant in error.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted.—Ed.

GRAY, J. The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers — such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment — is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443; *Myrick v. Michigan Central Railroad*, 107 U. S. 102, 109; *Hough v. Railway Co.*, 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the King's messengers for trespass and imprisonment under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the Chief Justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Lofft, 1, 18, 19; *S. C.* 19 Howell's State Trials, 1153, 1167. See also *Huckle v. Money*, 2 Wilson, 205, 207; *S. C.*, Sayer on Damages, 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 3 Wheat. 546, 558, 559; *Day v. Woodworth*, 13 How. 363, 371; *Phila-*

*delphia &c. Railroad v. Quigley*, 21 How. 202, 213, 214; *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489, 493, 495; *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 521; *Barry v. Edmunds*, 116 U. S. 550, 562, 563; *Denver & Rio Grande Railway v. Harris*, 122 U. S. 597, 609, 610; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26, 36.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. *Boston Manuf. Co. v. Fiske*, 2 Mason, 119, 121. In *Keene v. Lizardi*, 8

Louisiana, 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are: *The State Rights*, Crabbe, 22, 47, 48; *The Golden Gate*, McAllister, 104; *Wardrobe v. California Stage Co.*, 7 California, 118; *Boulard v. Calhoun*, 13 La. Ann. 445; *Detroit Post v. McArthur*, 16 Michigan, 447; *Grund v. Van Vleck*, 69 Illinois, 478, 481; *Becker v. Dupree*, 75 Illinois, 167; *Rosenkrans v. Barker*, 115 Illinois, 331; *Kirksey v. Jones*, 7 Alabama, 622, 629; *Pollock v. Gantt*, 69 Alabama, 373, 379; *Eviston v. Cramer*, 57 Wisconsin, 570; *Haines v. Schultz*, 21 Vroom, (50 N. J. Law,) 481; *McCarty v. De Armit*, 99 Penn. St. 63, 72; *Clark v. Newsam*, 1 Exch. 131, 140; *Clissold v. Machell*, 26 Upper Canada Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances. *Philadelphia &c. Railroad v. Quigley*, 21 How. 202, 210; *National Bank v. Graham*, 100 U. S. 699, 702; *Salt Lake City v. Hollister*, 118 U. S. 256, 261; *Denver & Rio Grande Railway v. Harris*, 122 U. S. 597, 608.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Philadelphia & Reading Railroad v. Derby*, 14 How. 468; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston & Albany Railroad*, 104 Mass. 117. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. *Philadelphia &c. Railroad v. Quigley*, 21 How. 202, 211; *Salt Lake City v. Hollister*, 118 U. S. 256, 262; *Reed v. Home Savings Bank*, 130 Mass. 443, 445, and cases cited; *Krulevitz v. Eastern Railroad*, 140 Mass. 573; *McDermott v. Evening Journal*, 14 Vroom, (43 N. J. Law), 488 and 15 Vroom, (44 N. J. Law,) 430; *Bank of New South Wales v. Owston*, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or

fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." *Lothrop v. Adams*, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In *Detroit Post v. McArthur*, in *Eviston v. Cramer*, and in *Haines v. Schultz*, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in *Haines v. Schultz* the Supreme Court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground — wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive — cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine *respondeat superior*." 21 Vroom, (50 N. J. Law,) 484, 485. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and where it has been held that he can, it is admitted to be an anomaly in the criminal law. *Commonwealth v. Morgan*, 107 Mass. 199, 203; *Regina v. Holbrook*, 3 Q. B. D. 60, 63, 64, 70, and 4 Q. B. D. 42, 51, 60.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Philadelphia &c. Railroad v. Quigley*, *Milwaukee & St. Paul Railway v. Arms*, and *Denver & Rio Grande Railway v. Harris*, above cited; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Bell v. Midland Railway*, 10 C. B. (N. S.) 287; *S. C.* 4 Law Times (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. *Kennon v. Gilmer*, 131 U. S. 22; *Meagher v. Driscoll*, 99 Mass. 281, 285; *Smith v. Holcomb*, 99 Mass. 552; *Hawes v. Knowles*, 114 Mass. 518; *Campbell v. Pullman Car Co.*, 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor, the jury were rightly in-

structed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called smart money," if they were "satisfied that the conductor's conduct was illegal, wanton and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents.

[The learned Judge then stated, and quoted from *R. Co. v. Derby*, 14 Howard, 470, 471; *R. Co. v. Quigley*, 21 Howard, 210, 213, 214; and *R. Co. v. Arms*, 91 U. S. 495.]

In *Denver & Rio Grande Railway v. Harris*, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employés, and organized and commanded by its vice-president and assistant general manager, attacked with deadly weapons the agents and employés of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in *Quigley's case*, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610.

The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself.



But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

[The learned Judge here stated, and quoted from *Hagan v. R. Co.*, 3 R. I. 88, 91; and also stated *Cleghorn v. R. Co.*, 56 N. Y. 44. He then proceeds to quote from the opinion in the latter case as follows:—]

Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." *Cleghorn v. New York Central Railroad*, 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern States. But of the three leading cases on that side of the question, *Hopkins v. Atlantic & St. Lawrence Railroad*, 36 N. H. 9, can hardly be reconciled with the later decisions in *Fay v. Parker*, 53 N. H. 342, and *Bixby v. Dunlap*, 56 N. H. 456; and in *Goddard v. Grand*

*Trunk Railway*, 57 Maine, 202, 228, and *Atlantic & Great Western Railway v. Dunn*, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedgwick on Damages, (8th ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages. But the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the

*Judgment must be reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial.*

MR. JUSTICE FIELD, MR. JUSTICE HARLAN and MR. JUSTICE LAMAR took no part in this decision.

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## NIMS v. MOUNT HERMON BOYS' SCHOOL.

1893. 160 Mass. 177.

KNOWLTON, J. The defendant is an educational corporation. The plaintiff seeks to recover damages for an injury received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says in the first place, that, if it maintained the ferry and hired and paid the ferryman, the business was

*ultra vires*, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferry-boat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defence to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. *Moore v. Fitchburg Railroad*, 4 Gray, 465. *Reed v. Home Savings Bank*, 130 Mass. 443. *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513. *Philadelphia, Wilmington, & Baltimore Railroad v. Quigley*, 21 How. 202, 209. *Merchants' Bank v. State Bank*, 10 Wall. 604. *National Bank v. Graham*, 100 U. S. 699. *Gruber v. Washington & Jamesville Railroad*, 92 N. C. 1. *Hussey v. Norfolk Southern Railroad*, 98 N. C. 34. If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry-boat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In *Bissell v. Michigan Southern & Northern Indiana Railroad*, 22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a State to which the charter of neither of them extended, and it was conceded that the defendants were acting *ultra vires*. The plaintiff recovered, Comstock, C. J. holding in an elaborate opinion that the corporations were liable under their contract, notwithstanding that the contract was *ultra vires*, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. Selden, J., in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it; but it was his opinion that, if the contract were set aside, the defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty for which the plaintiff could recover. Clerke, J. agreed with this view, and all but one of the other judges concurred in a decision

for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in *Buffett v. Troy & Boston Railroad*, 40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stage-coach which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of Comstock, C. J., given in the former case, or on that of Selden, J. Like decisions have been made under similar facts in *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572; *New York, Lake Erie, & Western Railway v. Haring*, 18 Vroom, 137; and *Hutchinson v. Western & Atlantic Railroad*, 6 Heisk. 634.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the Legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. *Monument National Bank v. Globe Works*, 101 Mass. 57. *Attorney General v. Tudor Ice Co.* 104 Mass. 239. *Davis v. Old Colony Railroad*, 131 Mass. 258. *Thomas v. Railroad Co.* 101 U. S. 71. *Leslie v. Lorillard*, 110 N. Y. 519. *Linkauf v. Lombard*, 137 N. Y. 417. *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, 803. On the other hand, courts have frequently held that, while such contracts considered merely as contracts are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong. *Leslie v. Lorillard*, 110 N. Y. 519. *Linkauf v. Lombard*, 137 N. Y. 417, 423. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether in this Commonwealth a contract entered into by a corporation *ultra vires*, and partly performed, will ever be enforced on equitable grounds, we need not now decide. See *McCluer v. Manchester & Lawrence Railroad*, 13 Gray, 124; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Attleborough National Bank v. Rogers*, 125 Mass. 339; *Atlas National Bank v. Savery*, 127 Mass. 75, 77; *S'ater Woollen Co. v. Lamb*, 143 Mass. 420; *Prescott National Bank v. Butler*, 157 Mass.

548; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Parish v. Wheeler*, 22 N. Y. 494; *Oil Creek & Allegheny River Railroad v. Pennsylvania Transportation Co.* 83 Penn. St. 160; *Bradley v. Ballard*, 55 Ill. 413. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires* but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners, under Pub. Sts. c. 55, § 1, to keep the ferry, but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition properly to perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry above his wages to the defendant's cashier and paymaster. For the month of April Deane was paid for his services by the defendant's paymaster out of the defendant's funds. In June, 1890, a new ferry-boat was constructed under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York,

monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title "ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it.

There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence.

If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act.

We are of opinion that the case should have been submitted to the jury.

*Exceptions sustained.*

*D. Malone*, for the plaintiff.

*C. C. Conant*, for the defendant.

## CENTRAL R. R. &amp; BANKING CO. v. SMITH.

1884. 76 *Alabama*, 572.<sup>1</sup>

## APPEAL from Circuit Court.

Action by Smith against the appellant, described as "a corporation created by the laws of Georgia, and doing business in Alabama by agents." Plaintiff seeks to recover damages for injuries sustained by the sinking of the steamboat *George W. Wyllly*, while running on the Chattahoochee river; the plaintiff having been a passenger at the time.

The complaint alleged that the defendant corporation was a common carrier, and was, in connection with one Whitesides (who was not sued), the owner and proprietor of said steamboat, and engaged in running and operating it for the transportation of passengers and freight for a reward; and that the accident and injury were caused by the negligence of the officers and persons in charge of the boat, and its unsound and rotten condition. The defendant pleaded not guilty, and a special plea which averred, in substance, that it had no authority under its charter to engage in running a steamboat on the Chattahoochee river, and that the persons who were engaged in running said steamboat, at the time of the alleged loss and injury, were not the agents or servants of said defendant. Issue was joined on both of these pleas.

Upon the trial certain evidence was admitted, against defendant's objection, to prove ownership of the steamer, and partnership or agency in operating it.

The Court, at defendant's request, instructed the jury that the defendant had no power under its charter to own or operate the steamboat. The Court, however, at plaintiff's request, added to this instruction: "But this will not excuse defendants, if the evidence shows they did operate it." To this addition, defendant excepted.

*J. D. Roquemore*, and *John Peabody*, for appellant.

*S. F. Rice*, and *H. R. Shorter*, *contra*.

CLOPTON, J. [The Court *held*, that certain evidence was improperly admitted. The Court also *held*, that the corporation had no power, under its charter, to own and operate the steamboat in association with a natural person. The opinion then proceeds as follows:]

7. With the postulate assumed, that the defendant has no authority to own and operate, in association with a natural person, a steamboat on the Chattahoochee river, for carrying persons and freights, there remains to be considered the liability of the defendant to a person for injuries suffered on a boat thus owned and operated, while a passenger thereon.

This court has repeatedly decided, that the contracts of corporations, which they have no power to make, are void, and that the courts will

<sup>1</sup> Statement abridged. Argument and part of opinion omitted. — Ed.

not enforce them. "Such contracts on the part of a corporation are *ultra vires*, and void, and no right of action can spring out of them." — *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448. No contract made by a corporation, not within the scope of its powers, can be made valid, or the foundation of a right of action, by the assent of the shareholders. If the corporation attempts to carry such contract into execution, dissentient stockholders, though a minority, may restrain its consummation. And if suit is brought against the corporation on such contract, they may avail themselves of the defense of *ultra vires*. — *Davis v. Old Col. R. R. Co.*, 131 Mass. 258. The settled doctrine of this court is, that a reception and retention of the fruits and benefits of the transaction do not estop the corporation from denying its power to make the contract; though an action may be maintained, in a proper case, against a corporation, for the money or property received, the legal effect of such suit being a disaffirmance of the prohibited contract.

Were the present action founded on a contract of transportation, it is unquestionable, that the defendant could successfully interpose the defense of *ultra vires*. The action is, however, *ex delicto*, founded on the common-law duty of a common carrier. The plaintiff does not require the aid of an illegal contract to establish his case; its enforcement is not necessary to entitle him to a recovery. The rules applicable are those which govern in cases of torts committed by a corporation. The question is, what is the liability of a corporation for a tort, committed while transacting a business without and beyond the purview of the corporate powers and purposes? This is followed by another question; by what authority, and in what manner, can a corporation be subjected to such liability?

While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technically *ultra vires*, it is well established, that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case, the doctrine of *ultra vires* has no application. — *Mer. Bank v. State Bank*, 10 Wall. 604. "A corporation is liable to the same extent, and under the same circumstances as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its general powers, the wrongful transaction or act may be." — *N. Y. & N. H. R. R. Co. v. Schwyler*, 34 N. Y. 30. Accordingly, actions have been maintained against corporations for libel, malicious prosecutions, assault, and other torts too numerous to be mentioned. — *Green v. Lon. Gen. Om. Co.*, 7 Com. B., N. S. 388; *P. W. & B. R. R. Co. v. Quigby*, 21 How. 202; *Jordan v. Ala. Gt. So. R. R. Co.*, 74 Ala. 85. Generally, it may be said, that corporations are liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied, or incidental. The distinc-



tion between the liability of a corporation, on an unauthorized contract, and for a negligent or wrongful act in the performance of such contract, is clearly and properly drawn by Selden, J., in *Bissell v. Mich. So. & No. Ind. R. R. Cos.*, 22 N. Y. 258; which was an action by a passenger on a train of cars, which by contract the two companies were unitedly running, for a breach of duty to convey him safely, the passenger having been injured by the negligence of their servants. The defense of the companies was, that, in making the contract, they transcended their powers, and, consequently, in judgment of law, they were not operating the road, and did not undertake to carry the plaintiff over it. After holding that the contract to operate the consolidated roads, and to transport the plaintiff, was illegal and void, he says: "It is said, that if the contract was *ultra vires*, and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true, so far as the duty to observe due care grows out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or has been run over by a train of cars, when crossing the railroad track. The duty to observe care, in these cases, arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others." An exemption from liability in such cases, because the act is *ultra vires*, would be a license to corporations to do wrongs to others. From these principles it follows, that if the defendant undertook the business of transporting persons by a mode of conveyance other than that authorized and provided by the charter, its duties and responsibilities to a passenger are the same as if the business was authorized and legal.

8. But, before the duties and responsibilities attach, the corporation must undertake and engage in the business, and thereby assume its burdens. Of this there can be no implication, from the isolated fact, that some officer or agent has engaged, in the name of the company, in running and operating the boats; in other words, there can be no implication that a corporation has made a contract, or engaged in business transcending its powers.—Green's *Brice's Ul. Vires*, 364. It may be inferred from proved circumstances, as other facts, but is not the subject of implication. Corporations are responsible for the wrongs committed by their officers, agents, or servants, while in the course of their employment; but, if the officer, agent, or servant, "go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not." *Gilliam v. S. & N. R. R. Co.*, 70 Ala. 268.

The limitation is, the scope of the employment, or delegated authority. If an officer or agent can not directly subject the corporation to liability for his tortious act beyond the range and course of his employment, though done while engaged in its performance, for what reason, or on what principle is it, that an officer or agent can, by making an unlawful transaction, and engaging in an unauthorized and unlawful business, in the name of the company, without the authority of the corporation, indirectly subject it to liability for the negligent or intentional wrongs of the agents or servants employed by him in the performance of such contract, or in carrying on such business? While corporations should be held to a strict responsibility for the wrongful acts of their employees, when done in the course of their employment, and connected with the execution of the business for which incorporated, they should be protected against the consequences of unauthorized acts of their officers or agents, committed in excess of its powers, and unconnected with the business or purposes of their incorporation and organization, especially when dealing with persons charged with notice of their powers, and the nature and extent of the employment and authority of the officer or agent.

In *Brokaw v. N. J. R. & T. Co.*, 32 N. J. Law, 328, it is said: "In considering the question whether the agent has the authority of the corporation, so as to make it answerable for his act, the purposes for which the company was incorporated must not be overlooked. An authority given even by the board of directors, in express terms, will not, in all cases, be the authority of the corporation. The directors are only agents themselves, and their powers are necessarily limited within the scope of the purposes for which the corporation was created, beyond which they are not authorized to bind the corporation. To fix the liability of a corporation for the tortious acts of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. If the directors should order an agent to take a person out of his house and beat him; or if the directors of a banking company should purchase a steamboat, and engage in transporting passengers, the corporation would not be liable for the misfeasance or nonfeasance of agents employed in that business." It is true that the board of directors may be invested by the charter, or general law, with such management and authority as practically to constitute it the corporation; but, by the provisions of the charter of the defendants, the directors are agents and representatives, with authority limited by the scope of the powers, business, and purposes of the corporation. It will be observed that the business was not carried on in the name of the corporation. As there is no implied authority of any officer or agent to make an *ultra-vires* contract, or transaction, and on that ground merely bind the corporation, it follows, that if the boats were purchased and engaged, in connection with Whitesides, in the business of transporting persons and freight on the Chattahoochee river, by the presi-

dent, superintendent, or even the directors, the corporation is not bound thereby, and is not liable for the negligent or wrongful acts of the persons employed in such business, unless the transaction was previously authorized, or subsequently ratified by the corporation. Without such authority or ratification, the persons thus employed are not the agents or employees of the corporation. As the immediate or direct act of the officer or agent, in such case, can not bind the corporation, his mere knowledge of, and acquiescence in the prosecution of such business, are not tantamount to a ratification by the corporation. Considering the difference between the principles which govern the liability of the company for the tortious acts of its agents committed in the course of their authorized employment, and its liability for the tortious acts of persons employed in the conduct and prosecution of a business undertaken on behalf of the corporation by its agents, beyond the range of their employment, and prohibited by the laws of its creation, the previous authority or subsequent ratification, in order to bind the corporation, must be in corporate capacity.

A corporation is an artificial body, a distinct person, in legal contemplation, from the stockholders, in which the corporate property is vested. Its will is usually or ordinarily expressed at a meeting of the corporators. Its officers are its agents, and not the agents of the stockholders. In this sense, previous authority, to bind the corporation by the act of an officer or agent transcending its powers and unconnected with its authorized business and purposes, must be the result of corporate action, as contradistinguished from the individual action of the stockholders or officers. Subsequent ratification results, when a knowledge of the business being thus conducted, and of the reception and retention of its fruits and benefits, is brought home to the corporators, at a time, and under circumstances which require them to elect to repudiate or be bound, and they fail to disavow the act; in other words, any facts, which would be a ratification of the unauthorized acts of an agent by a principal who is a natural person.

An application of these principles will probably be a sufficient guide on another trial.

*Reversed and remanded.*

## CHAPTER XIII.

LIABILITY OF CORPORATION FOR CRIMES AND  
CONTEMPTS.

## ANONYMOUS.

13 *Wm. 3.* 12 *Modern*, 559 (*Case No. 935*).

NOTE: *Per Holt, Chief Justice.* A corporation is not indictable, but the particular members of it are.

## THE QUEEN v. BIRMINGHAM &amp; GLOUCESTER R. Co.

1842. 3 *Queen's Bench (Ad. & Ell. N. S.)* 223.

INDICTMENT, found at the Spring assizes for the county of Worcester, 1840, against a corporation aggregate, the Birmingham and Gloucester Railway Company, for disobedience to an order of justices and an order of sessions confirming it, whereby the defendants, pursuant to certain provisions contained in the statute,<sup>1</sup> incorporating the company, were directed to make certain arches to connect lands which had been severed by the railway. The defendants not coming in to plead under the usual venire, some of the goods of the company were seized under a distringas; and at the Worcester Summer assizes, 1840, two of the directors appeared in court to plead, but the officer of the court refused to receive their plea; and, an application on the subject being made to the learned Judge, (PARKE, B.) he intimated an opinion that the defendants could appear only by attorney, that they could not appear by attorney at the assizes, and that the only course was to remove the indictment by certiorari into this Court, and that the defendants should plead by attorney there.<sup>2</sup>

In Hilary term, (January 21st,) 1841, *Whateley* obtained a rule for a certiorari to bring up the indictment; LITLEDALE, J., observing, on the motion, that he never heard of an indictment against a company for disobedience to an order. In the same term *Whateley* obtained a

<sup>1</sup> 6 & 7 W. 4, c. xiv., local and personal, public.<sup>2</sup> *Regina v. The Birmingham and Gloucester Railway Company*, 9 C. & P. 469.

rule to show cause why the indictment should not be quashed, as not being maintainable against a corporation. In Trinity term, 1841,<sup>1</sup>

*Talfourd*, Serjt., showed cause, and contended that, although an indictment for misfeasance would not have lain, corporations were indictable for omission of duty.<sup>2</sup> (The authorities and precedents mentioned were again cited on the argument of the demurrer.) He also urged that the objection taken was no ground for a motion to quash, but might be raised on demurrer, in arrest of judgment, or by writ of error. On this point he cited *Rex v. Cooke*, 2 B. & C. 618.

*Whateley*, in support of the rule, contended that in all the precedents individuals were pointed out against whom ulterior proceedings could be taken on conviction: here it was not known who composed the company. And that, if the prosecutors demurred and judgment were given against them, they would be concluded.

LORD DENMAN, C. J. As to the proceedings, I do not feel the difficulty so strongly as you put it. We do not, however, wish to decide the point on this motion. We take upon ourselves to say that you may demur; and, if we decide against you, you may plead over.

*Per curiam*;

Rule discharged.

The defendants appeared in this Court, and demurred: and, the prosecutors having joined in demurrer, the case was argued, in last Hilary term,<sup>3</sup> by

*Whateley*, for the defendants.

But, supposing the defendants to have pleaded and to have been found guilty, no punishment can follow: the judgment for a misdemeanor is that the defendant be fined, et quod idem A. B. capiatur ad satisfaciendum dicto Domino regi de fine prædicto: that is the form in *Fanshawe's Case*, Trem. P. C. 202. 204; and a similar form is used in *Holles' Case*, Trem. P. C. 294. 302. A corporation aggregate cannot be taken; and, supposing it to have no property, there is no punishment that could be enforced; they cannot "be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty," Bro. Ab. Fealtie & Homage, pl. 15; *The Case of Sutton's Hospital*, 10 Rep. 1 a, 32 b. So in Com. Dig. Franchises, (F 19,) it is said that "process of outlawry does not lie against a corporation aggregate;" "and therefore trespass does not lie against a corporation, but against the particular persons only; for a capias and exigent do not go against a corporation."

[Remainder of argument omitted.]

*Talfourd*, Serjt., *contra*.

[Argument omitted.]

*Cur. adv. vult.*

<sup>1</sup> May 27th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

<sup>2</sup> Stat. 6 & 7 W. 4, c. xiv., s. 1, enacts that the company may "sue and be sued" by their corporate name; and sect. 120, regulates the form of indictment in prosecutions by them: but the act gives no direction as to indictments against them.

<sup>3</sup> Wednesday, January 26th. Before Patteson, Coleridge, and Wightman, Js.

PATTESON, J., in this term, (May 28th,) delivered the judgment of the Court. After stating the indictment, removal by certiorari, appearance, demurrer, and ground of demurrer, his Lordship proceeded as follows.

Upon the argument it was not contended on the part of the company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law, since the case of *Yarborough v. The Bank of England*, 16 East, 6, in which the cases were reviewed, that both trover and trespass are maintainable: but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position; and it is a dictum of Lord HOLT in an Anonymous case reported in 12 Mod. 559. The report itself is as follows: "Note: Per HOLT, Chief Justice. A corporation is not indictable, but the particular members of it are." What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults; Hawk. P. C., B. 1, c. 66, s. 13, Vol. ii. p. 58, 7th. ed.

A corporation aggregate may be liable by prescription, and compelled, to repair a highway or a bridge; Hawk. P. C., B. 1, c. 76, s. 8, c. 77, s. 2, Vol. ii. pp. 156. 258: and in the case of *Rex v. The Mayor, &c. of Liverpool*, 3 East, 86, the corporation were indicted by their corporate name for non-repair of a highway, and, upon argument in this Court, the indictment was held to be defective; but no question was made as to the liability of a corporation to be indicted.

In the case of *Rex v. The Mayor, &c. of Stratford-upon-Avon*, 14 East, 348, the corporation was indicted by its corporate name for a non-repair of a bridge, and found guilty, and upon argument in this Court the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

Upon the discussion of the question in the present case, the counsel for the company relied chiefly upon the circumstance of the indictment being found at the quarter sessions,<sup>1</sup> where the company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the sessions must be in person. We think there is no weight in this objection. It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by certiorari into this Court in order to make it effective; but the liability of the corporation is not affected.

In the case of *Rex v. Gardner*, 1 Cowp. 79, it was objected that a corporation could not be rated to the poor, because the remedy by im-

<sup>1</sup> It was so put, hypothetically, in the argument for the defendants.

prisonment upon failure of distress was impossible; but the Court considered the objection of no weight, though it might be that there would be some difficulty in enforcing the remedy.

The proper mode of proceeding against a corporation, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by certiorari, as suggested by Mr. Baron PARKE in this very case, reported in 9 Car. & Payne, 469, and as appears by Hawk. P. C., B. 2, c. 27, s. 14, Vol. iv. p. 140, and the cases cited in 6 Vin. Abr. 310, &c., tit. Corporations, (B. a) Vol. iv. p. 140.

We are therefore of opinion that upon this demurrer there must be judgment for the Crown.

Judgment for the Crown.

## THE QUEEN v. GREAT NORTH OF ENGLAND R. CO.

1846. 9 *Queen's Bench* (*Ad. & Ell. N. S.*), 315.<sup>1</sup>

INDICTMENT against an incorporated railway company for cutting through and obstructing a highway. Plea, not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the Durham Spring assizes, 1845, evidence was given, on the part of the prosecution, to show that the Company had cut through a carriage road with the railway, and had carried the road over the railway by a bridge not satisfying the statutory provisions. For the defendants, it was objected that no indictment for a misfeasance could be maintained against a corporation; and as to the first four counts, that the defendants were authorised to cut through the road and erect the bridge, and that, if in doing so, they had not complied with the statutory provisions, they ought to have been indicted for breach of those provisions.<sup>2</sup> Other objections were taken to the last five counts, which it is unnecessary to state. A verdict was found for the Crown on all the counts, leave being reserved to move to enter a verdict for the defendants, or to arrest the judgment.

In Easter term, 1845, *Wortley* obtained a rule accordingly. In this term,<sup>3</sup>

*Granger*, *Otter*, and *Bovill* showed cause.

*Knowles*, *Bliss*, and *Joseph Addison*, contra.

*Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The question is, whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted, in conformity with

<sup>1</sup> Statement abridged. Arguments omitted. — Ed.

<sup>2</sup> The argument, as to this point, in banc, is omitted in the report, the Court having pronounced no express decision upon it: *Regina v. Scott*, 3 Q. B. 543, was referred to.

<sup>3</sup> Tuesday, May 26th, and Monday, June 8th. Before Lord DENMAN, C. J., PATERSON, and WIGHTMAN, Js.

undisputed decisions, that an indictment may be maintained against a corporation for nonfeasance.

All the preliminary difficulties, as to the service and execution of process, the mode of appearing and pleading, and enforcing judgment, are by this admission swept away. But the argument is, that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence.

No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?

But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other?

The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.

Some dicta occur in old cases: "A corporation cannot be guilty of treason or felony." It might be added "of perjury, or offences against the person." The Court of Common Pleas lately held that a corporation might be sued in trespass, *Maund v. The Monmouthshire Canal Company*, 4 M. & G. 452; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases; but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large. The late case of *Regina v. Birmingham and Gloucester Railway Company*, 3 Q. B. 223, was confined to the state of things then before the Court, which amounted to nonfeasance only; but was by no means intended to deny the liability of a corporation for a misfeasance.

We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual



means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings.

The verdict for the Crown, therefore, on the first four counts, will remain undisturbed.

Judgment to be entered on the first four counts; arrested on the others.

## STATE v. PASSAIC COUNTY AGRICULTURAL SOCIETY.

1892. 54 *New Jersey Law*, 260.<sup>1</sup>

IN error to Passaic Quarter Sessions.

Argued at June Term, 1891, before BEASLEY, CHIEF JUSTICE, and Justices VAN SYCKEL and KNAPP.

For the plaintiff in error, *Robert I. Hopper* and *Samuel Kalisch*.

For the State, *William B. Gourley*.

The opinion of the court was delivered by

VAN SYCKEL, J. The defendant was convicted in the Passaic Quarter Sessions for keeping a disorderly house.

[Omitting part of opinion.]

*Thirdly*. It is urged that a corporation cannot be indicted for keeping a disorderly house. )

Some of the earlier cases held that trespass or case would not lie against a corporation for a private nuisance, but that doctrine has long since been exploded. In early days when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained.

In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution.

Mr. Wharton says that no good reason can be assigned why the same acts, for which these bodies are subject to civil suit, may not equally be the basis of criminal proceedings when they result in injury to the public at large. 1 *Whart. Cr. L.*, § 87.

*The Queen v. The Great North of England Railway Co.*, 9 *Q. B.* 316, is a leading and instructive case on this subject, showing the advance which the doctrine holding corporations criminally liable had made at the date of that adjudication.

<sup>1</sup> Only so much of the opinion is given as relates to one point. — ED.

The earlier cases are cited there, and the summing up of Lord Chief Justice Denman shows how firmly he held to the idea, that upon reason and policy an indictment could be supported against a corporation for misfeasance as well as for non-feasance.

He entertained no doubt that a corporation may be guilty, as a corporate body, of commanding acts to be done to the nuisance of the community at large.

In reply to the suggestion that the individuals who concur in doing the inhibited acts on behalf of the corporation may be indicted, he said, that while of that there was no doubt, there can be no effectual means for deterring from the commission of criminal acts, except the remedy by an indictment against those who truly commit them — that is, the corporation acting by its majority; and that there is no principle which places them beyond the reach of the law for such proceedings.

In *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray 339, the Massachusetts Supreme Court adopted the same view, declaring that the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities to individuals.

Mr. Beach in his treatise on Private Corporations (Vol. II., p. 458), says that the tendency of judicial decision has been to extend the liability of corporations in civil actions for the misfeasance of their agents, so that it is well settled that they may be held liable for libel, malicious prosecution and for assault and battery committed by their agents in the performance of their duties, and in view of the fact that they may in such suits be subjected to exemplary or punitive damages, the assertion that they cannot be held liable to indictment for any offences, which derive their criminality from evil intent, may well be questioned.

The very basis of the action for libel or for malicious prosecution is the evil intent, the malice of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indictable for like offences, where the injury falls upon the public.

That malice and evil intent may be imputed to corporations has been repeatedly adjudged. *Morton v. Metropolitan Life Ins. Co.*, 103 N. Y. 645; *Reed v. Home Savings Bank*, 130 Mass. 443; *Buffalo Company v. Standard Oil Co.*, 106 N. Y. 669.

The case last cited was an action to recover damages caused by conspiracy.

So far as this question has been agitated in New Jersey, our decisions have been in line with the cases which have been cited. *State v. Morris Canal Co.*, 2 Zab. 537; *State v. Godwinville, &c.*, 20 Vroom, 266; *McDermott v. The Evening Journal*, 14 Id. 488; *Brokaw v. New Jersey R. R. Co.*, 3 Id. 328.

The question whether criminal intent may be imputed to a corporation is not necessarily involved in the discussion of the case before us.

The habitual indulgence in the vicious practices on the premises of the defendant corporation stamps it as a disorderly house, without regard to the intent which prompted the disorder.

In my opinion, the judgment below should be affirmed.

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## PUBLIC STATUTES OF MASSACHUSETTS.

### CHAP. 3. SECT. 3.

"In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute; — that is to say, —

"Sixteenth, the word 'person' may extend and be applied to bodies politic and corporate."

As to whether "person" in statute includes corporation —

"The rule would seem to be, that *primâ facie* it does, because a corporation is an artificial person created by the law; but considerations of the subject, object, and connected words of the particular statute may lead to the contrary result."

Bishop on Written Laws, s. 212.

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## PEOPLE v. ALBANY & VERMONT R. CO.

1860. 12 *Abbott's Practice Reports* (N. Y.), 171.

Supreme Court, Third District; Special Term, Oct. 1860.

Motion to punish for contempt.

In this action which was brought to restrain the defendants from abandoning a part of their railroad, an injunction was obtained by the plaintiffs, forbidding defendants and their agents from taking up or removing their road, or selling or disposing of the iron forming the track thereof, or any part thereof, except such as were unfit for use, and necessarily removed in repairs. The decision of the court in granting the injunction is reported 11 *Ante*, 136.

The plaintiffs now moved, on affidavits that a part of the track had been taken up, for an order convicting defendants of contempt and punishing them by sequestration. The facts which appeared in relation to the alleged breach of the injunction are stated in the opinion.

*J. Gibson* and *John H. Reynolds*, for the motion.

*J. B. Gale* and *W. A. Beach*, opposed.

HOGEBOM, J. The proceeding by injunction is an important branch of the remedial power of this court. It operates with great and salutary effect to prevent many public and private injuries, for which no other equally effective and comprehensive remedy exists.

To render it of any avail, it must of course be capable of being enforced. And it would be a matter of serious regret, if, in all cases where the power to issue the process of injunction exists, the power of compelling obedience to it did not also exist. I cannot believe there is such a solecism in the law. If there is, it deserves immediate attention on the part of the Legislature.

It is not denied that an injunction may issue against a corporation. It is every day's practice to issue process of that character. A corporation is an actual existence, in a legal sense, as much as a natural person. It is an artificial being, it is true, but it can act, and frequently with great, and it may be, with ruinous effect. It is conceded it may, by the courts, in a proper case, be restrained from acting—that is, be ordered not to act in a given way.

Is it possible that this order cannot be enforced? Are courts so impotent, is the law so defective, that the order of the court cannot be carried into effect against the offending party? It would be a gross reflection upon the law of the land if this were so.

It is not so. The power that makes the order can enforce it. The party who disobeys the order may be punished for it. I acknowledge no exception to the rule. For this purpose, the court is the government; the representative of the people; the embodiment of the law. Every person within its jurisdiction, high or low, natural or artificial, is, in a proper case, subject to its power, and, in case of disobedience, amenable to punishment.

It is no answer to say that the act of the corporation is manifested and carried into effect by individuals, and that those persons are always liable to the process of the law, and may be punished, and therefore an injured party has always the means of redress. It is a poor compliment to the law to say that while the principal is the real offender, though you cannot reach him, you can reach his agent,—his instrument. Besides, the agent may be entirely irresponsible, or comparatively innocent.

And why cannot a corporation be punished for contempt? It is said because it cannot be attached, that is, personally seized or taken. This shows no sufficient reason. In the former equity practice, it sometimes became necessary to order a corporation to answer a bill in chancery. If it refused, it was not strictly attached, as a natural person would be, but a *distringas*, or writ authorizing a distress upon its property, was issued; this failing, a second, and sometimes a third, was issued, and, if all these were insufficient, then process of sequestration was issued against it, and its property sequestered for the benefit of the aggrieved party. (1 *Barb. Ch.* 76.) Why may not process of sequestration be issued against it, to punish it for contempt in violating an injunction,

as well as contempt in refusing to answer? Why may it not be fined for the contempt, and the fine collected in the ordinary way? Corporations are often indicted for neglect of duty, or for positive misfeasance, and the punishment, upon conviction, is by the imposition of a fine. The punishment by fine for a contempt is one of the usual modes of punishment, and directly recognized by statute. (2 *Rev. Stat.* 538.) So, also, the sequestration of property is recognized among the elementary writers; and in adjudicated cases, as an appropriate and lawful mode of punishment for a contempt. (2 *Barb. Ch.* 280; *Van Santv. Eq. Pr.* 635; *People v. Rogers*, 2 *Paige*, 103; *Lupton v. Hescott*, 1 *Sim. & Stew.* 274.)

It is quite true, as before stated, that the parties directly guilty, in their own persons, of a violation of the injunction, may be punished. That may be necessary or expedient to be done; but that may not be enough; it may be, and often is, quite proper that the principal offender, who sets on foot the violation of the injunction, should be punished and made to feel the power of the law.

Nor is it any answer to say that thus the innocent stockholders may suffer for the offensive or unlawful acts of the directors of a corporation. That is always so; that is incident to the very nature of a corporation. The directors are the agents of the stockholders, appointed by them, and they, like all others who appoint unworthy or indiscreet agents, must take the consequences of their own unfortunate selection.

I cannot coincide in the opinion expressed by the late Mr. Justice Duer, of the Superior Court of New York, in *Davis v. Mayor, &c., of N. Y.* (1 *Duer*, 484), as to the inefficiency of this process upon the corporation itself. It is true that a corporation cannot be personally attached or apprehended; but I do not agree that there are no means by which its obedience to an injunction can be compelled, or its disobedience punished; or that, as to the corporation itself, the injunction is a mere *brutum fulmen*. On the contrary, I think the means of punishment are within the reach of the court, and though not probably quite so effective as in the case of a natural person (for imprisonment cannot be resorted to), yet they are sufficiently so in most cases to effect the desired object. Much of the supposed impunity of corporations, as such, from punishment for contempt, when spoken of in the elementary treatises on this subject, is founded, I think, upon the idea that they cannot be attached, from which it by no means follows that other modes of punishment may not be administered.

Substantially the same views which I have here expressed are taken in a recent treatise on equity practice. (*Van Santv. Eq. Pr.* 641.) The author states, indeed, that a corporation is not amenable to process of contempt; but he holds further, that "a corporation, not being amenable to process of contempt, may be proceeded against by writ of sequestration;" and, by statute, this process is explicitly authorized against a corporation upon the return of an execution unsatisfied upon

a judgment at law or decree in equity. (2 *Rev. Stat.* 463; *Van Santv. Eq. Pr.* 646.)

I am satisfied, therefore, of the power of the court to punish a corporation for a wilful disobedience of the order of the court; but I am not satisfied that in this case the evidence is sufficient to convict the defendants of a violation of the injunction.

[*Omitting remainder of opinion.*]

## CHAPTER XIV.

## EFFECT OF ULTRA VIRES TRANSACTIONS.

## SECTION I.

*Transaction within the apparent Authority of the Corporation, and rendered Ultra Vires only by Reason of the Purpose entertained by the Corporation, or by other extrinsic Facts.*

## MONUMENT NAT'L BANK v. GLOBE WORKS.

1869. 101 Mass. 57.

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defence cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Naragansett Bank v. Atlantic Silk Co.* 3 Met. 282. And it was held in *Bird v. Daggett*, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The

question was not discussed, nor the reasons for the decision fully stated, in *Bird v. Daggett*; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.* 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bonâ fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose; and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.* 5 Bosw. 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.



So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

*Judgment for the plaintiffs.*

*R. H. Dana, Jr., & T. K. Lothrop*, for the defendants.

*C. A. Welch & W. W. Warren*, for the plaintiffs.

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## SECTION II.

### *Executed Transfers to, or from, Corporation in Excess of Charter Authority.*

#### LEAZURE v. HILLEGAS.

1821. 7 *Sergeant & Rawle (Pa.)*, 313.<sup>1</sup>

ERROR to the Common Pleas of Bedford County.

Frederick Hillegas, the plaintiff below, (who is defendant in error), claimed the land in dispute under a warrant and survey to *Thomas Holt*, who conveyed to *George Armstrong*, who conveyed to *William Henry*, who conveyed to the *Bank of North America*, who conveyed to *James Ross*, who conveyed to the *Plaintiff*. On the trial several exceptions were taken to the opinion of the Court on points of evidence.

*Tod*, for plaintiff in error.

*J. Riddle and Thompson*, for defendant in error.

TILGHMAN, C. J.

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

The third exception was, to the admission of the deed from the *Bank of North America* to *James Ross*, to which there were two objections, first, that there was no evidence of the seal of the corporation; and second, that the corporation was incapable of receiving a conveyance of land, otherwise than by mortgage, and therefore had no estate which could be conveyed. The first exception [objection] was good.

But the great points in this cause are, the capacity of the bank to *take* the land conveyed by *William Henry's* deed, and afterwards to *convey* the same to *James Ross*. There is no doubt that a corporation must be governed by the charter, from which it derives its existence. It can do no act nor take any estate contrary to its charter. If therefore it can be shown, that the *Bank of North America*, is forbidden by its charter, either to *take*, or to *convey*, the land contained in *William Henry's* deed, the plaintiff's action cannot be supported. By the 3d section of the Act of Incorporation, (17th of *March*, 1787, 2 *Sm. L.* 399,) the bank is made capable "to have, hold, purchase, receive, possess, enjoy, and retain, lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature or quality, to the amount of two millions of dollars and no more, and also to sell, grant, &c. the same lands, &c. Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to *purchase* and *hold*, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, *and to such lands and tenements which are or may be bona fide mortgaged to them as securities for their debts.*" It is remarkable, that with regard to the *holding* of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold, not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those, "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction, must have arisen from the extreme jealousy of monied corporations which pervaded the mind of the Legislature when the *Bank of North America* was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one, which risked its capital on a field altogether untried in *America*, and which had the merit of rendering essential service to the *United States*, during the war of the revolution. It would be improper therefore, to carry the restriction, *by construction*, farther than the words of the law plainly import. The restriction is, that the bank shall not *purchase and hold*. *Purchasing and holding*, are very different things, and the consequences of each are very different. If the words had been,

that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although *purchasing and holding* might have been thought dangerous, because of the power which it would have given the bank to bring too much land into *mortmain*, yet to *purchase*, subject to the statutes of *mortmain*, which authorised the Commonwealth to appropriate the land to its own use, could be attended with no danger. This construction would satisfy the jealous policy of the Legislature, preserve the community from the danger of too great a mass of real property held in *mortmain*, and at the same time put it in the power of the Commonwealth to act towards the bank, as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from *William Henry*, a conveyance of his land at a fair price, in payment of a debt *bona fide* due, it would be hard to presume, that they knew they were acting in violation of their charter. But granting that the restriction in the charter, did not extend to the simple act of *purchasing*, it may be asked, whence did the corporation derive the *right to purchase*, and what would be the situation of land purchased, without a capacity of holding. The answer is, that a corporation has, *from its nature*, a right to *purchase* lands, though the charter contains no license to that purpose. And in this respect the statutes of *mortmain* have not altered the law, except in case of *superstitious uses*. But since those statutes, it is necessary, in order to enable a corporation to *retain* lands which it has purchased, to have a license for that purpose; otherwise, in *England*, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the *mesne* lords, the king takes the land so aliened, for ever. That this is the law appears from the following authorities. 2 *Black. Com.* 268, 269. *Co. lit.* 2. 6 *Vin. Ab.* 265. (*G. pl.* 2.) *id.* 266. *pl.* 8. *Jenk. Cent.* 270. 3 *Com. Dig.* 399. (*F.* 10.) *id.* 401. (*F.* 15.) 1 *Roll. Ab.* 513. 1. 35. 10 *Co.* 30. But in *Pennsylvania*, where there are no *mesne* lords, the right would accrue immediately to the Commonwealth. It has been objected however, that according to the report of the Judges of this Court, made on the 14th *December*, 1808, in pursuance of an Act of Assembly requiring them to make a report of the *English* statutes which are in force in the Commonwealth, &c., it appears, that all conveyances of land to a corporation, without license, are absolutely void. I will consider this objection. The Judges reported the following statutes of *mortmain*, “ 7 *Ed.* I. (*Stat.* 2.) 13 *Ed.* I. *ch.* 32. 15 *Rich.* II. *ch.* 5, and 23 *Hen.* VIII. *ch.* 10; which are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are

for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility." I have quoted the words of the report, and it is evident that the Judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now by reference to the statutes, it will appear, that in all of them, except the 23 *Hen. VIII. ch. 10*; the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned, to the right of the several *mesne* lords, and in their default, of the king, to enter and hold in fee. But by the statute of 23 *Hen. VIII. ch. 10*, (which has been determined to extend to *superstitious uses only*, see 2 *Black. Com.* 273. 1 *Co. Rep.* 24,) uses and trusts, made and contrived in favour of religious persons, or any bodies corporate, for more than twenty years, shall be utterly void. Now the meaning of the report of the Judges is, that, according to the statute cited by them, conveyances to *superstitious* uses, are absolutely void, and conveyances to corporations, to uses *not superstitious*, are so far void, that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the Commonwealth, who may appropriate them to its own use at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title, it must be shewn that the corporation had power, not only to take by purchase, but to *alien*. In this respect I consider a corporation in the situation of an alien, who has power to take, but not to hold. That an alien may take by purchase, (though not by descent,) has been settled from the earliest times. It is so laid down in *Co. Lit.* 2, and I believe has never been questioned. Neither has it been questioned, that the land is subject to forfeiture, and may be seised for the king, after office found. But it has been questioned, what is the right of the alien before office found for the king. Without reference to *English* cases, which leave the matter in doubt, we have the highest authority in our own country for saying, that until some Act done by the Commonwealth according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the Commonwealth. This principle was asserted by Judge STORY, who delivered the opinion of the Supreme Court of the *United States*, in the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 *Cranch*, 603; and this was the opinion of the Supreme Court of *Massachusetts*, in the case of *Sheafe v. O'Neil*, 1 *Mass. Rep.* 256. cited by Judge STORY. It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate, may convey a defeasible estate. Provided the right of the Commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing then, that the cases of the alien, and the corporation be similar, (and I see not how they can be distinguished,) it follows that the deed, from the *Bank of North America* to *James Ross*, conveyed a fee simple, defeasible by

the Commonwealth. The counsel for the plaintiff did indeed contend, that this deed might be considered as a mortgage, though on its face it appears to be an absolute conveyance. But this construction cannot be supported. In order to carry the intent of the grantor into effect, a deed intended to operate as one species of conveyance, may be construed to operate as another, provided it contain words sufficient. But it cannot be construed so as to *destroy* the intent of the parties, as would be the case by holding this deed to be a mortgage; for it was the clear intent of both parties to make an absolute sale, and not a mortgage. When *William Henry* conveyed the lands mentioned in his deed, it was his intent, that in consideration thereof, the debt due from him to the bank should be extinguished, and the bank agreed to accept the conveyance in satisfaction of the debt. But supposing it to be a mortgage, the debt would be extinguished, and *Henry* would still remain responsible. I am clearly of opinion therefore, that it was not a mortgage, but an absolute conveyance.

Upon the whole, I am of opinion, that there was error, in admitting the deed from the *Bank of North America* to *James Ross* without proof of the corporate seal, and that there is no other error in the record. The judgment is therefore to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

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## LONG v. GEORGIA PACIFIC R. CO.

1890. 91 *Alabama*, 519.<sup>1</sup>

MCCLELLAN, J. The case made by the amended bill is this: On April 23, 1883, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Co. a deed upon valuable consideration presently paid, to and of the iron, coal and oil interests and properties in and pertaining to certain tracts of land, aggregating about four thousand acres; the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void, because of this incapacity of the corporation, and to have the same cancelled as a cloud upon complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

<sup>1</sup> Statement and arguments omitted.—Ed.

Only those grounds of error which present the question, whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to hold the same, can have any relief in respect to the transaction, are discussed in argument; and to these our consideration will be confined, since it is manifest that the determination of this question, in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

It is thoroughly well settled law, that a party to an *ultra vires executory* contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. — *Marion Savings Bank v. Dunklin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 83 Ala. 115; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344. But, where the contract is fully executed — where whatever was contracted to be done on either hand has been done — a different rule prevails. In such case, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties voluntarily doing of what they have unlawfully agreed, places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other what was parted with. The reason for which is, that, since they are equally in fault, the law will help neither." — Bishop on Contracts, § 627.

The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. — *Morris v. Hale*, 41 Ala. 510; *Ingersoll v. Campbell*, 46 Ala. 282; *Sherwood v. Alvis*, 83 Ala. 115; *Dadley v. Collier*, 87 Ala. 431; *Craddock v. Mortgage Co.*, 88 Ala. 281. And this is the doctrine generally declared by other courts. — *Thomas v. Railroad Co.*, 101 U. S. 71; *Day v. S. S. B. Co.*, 57 Mich. 146; s. c., 52 Amer. Rep. 352; *Parish v. Wheeler*, 22 N. Y. 494; *Miners' Ditch Co. v. Tellerbach*, 37 Cal. 542, 606; *Terry v. Eagle Lock Co.*, 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the

premises, and bring the transaction within the principle we have been considering, which denies to the complainant any relief in respect to it.

The same conclusion is reached by another well established principle. It is, that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the State, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found. — *E. & B. Railroad Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Lathrop v. Bank*, 8 Dana, 114, 129; *Hough v. Cook County Land Co.*, 73 Ill. 23; s. c., 24 Amer. Rep. 230; *Cowles v. Springs Co.*, 100 U. S. 55; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 413; 2 Mor. Corp. § 710.

The decree of the chancellor is affirmed; and the same result is reached in the case of *B. L. Jones and B. B. Long v. Ga. Pac. Railway Co.*, submitted with this case, and involving the same question.

Affirmed.

## FAYETTE LAND CO. v. LOUISVILLE & NASHVILLE R. CO.

1896. *Supreme Court of Appeals of Virginia*.<sup>1</sup>

### APPEAL from Circuit Court.

Bill in equity by L. & N. R. Co. against Fayette Land Co. *et als.*, to enforce payment for land sold by plaintiffs to defendants. In 1888, Flanary and wife conveyed to H. M. Smith, agent, a tract of 330 acres in Wise County, Va. In this transaction Smith was acting as agent for the L. & N. R. Co. In 1890 the L. & N. R. Co. conveyed to the Fayette Land Co. this tract, reserving a right of way and a depot site. One third of the purchase money was paid down. The remainder was payable in 1891 and 1892; and the vendor retained a lien on the land conveyed. H. M. Smith united in the deed to the Fayette Land Co. The bill avers that the balance of the purchase money is still unpaid, and prays that the defendant company may be required to pay it. Such proceedings were had that the Circuit Court entered a decree in favor of plaintiff for the balance claimed.

<sup>1</sup> From copy of opinion furnished by State Reporter. Only so much of the case is given as relates to one point. — Ed.

*J. H. Fulton, E. M. Fulton, R. C. Minor, and R. T. Irvine*, for appellant.

*J. F. Bullett, Jr., and H. C. McDowell, Jr.*, for appellee.

KEITH, P. [After stating the case, and disposing of other assignments of error.]

These preliminary matters having been disposed of, we come now to the seventh assignment of error, which is that the court erred in giving a decree against the appellants on the merits.

The Louisville & Nashville R. R. Co. is a Kentucky corporation, authorized by an act of Assembly of this State, approved March 30, 1887 (Acts Extra Session, 1887, p. 19), to construct and operate a line of railroad in Virginia. By that Act it is made subject to all the limitations and restrictions imposed by the laws of Virginia upon railroad companies, and it is contended by appellant that Sec. 1073 of the Code of 1887, which is as follows: —

“The land acquired by any company incorporated for a work of internal improvement along its line generally, shall not exceed one hundred feet in width, except in deep cuts, and fillings, and then only so much more shall be acquired as may be reasonably necessary therefor; the lands which it may acquire for buildings or for an abutment along its line generally, shall not exceed three acres in any one parcel; and the land which it may acquire for buildings, or other purposes of the company at the principal termini of its work, or any place or places within five miles of such termini, shall not exceed fifteen acres in any one parcel; but in the case of a railroad company, land not exceeding forty acres in any one parcel may be acquired for its main depots, machine shops, and other necessary purposes connected with the business of said company,”

— renders the appellee incapable of acquiring or taking title to the real estate set out and described in its bill, and that therefore no title passed from it to the appellant, but that it is or was absolutely void or conveyed at most a defeasible title, the land being subject even in the hands of an alienee from a railroad company to be escheated to the Commonwealth. It may be conceded that if this were a bill for specific performance of a contract that the relief would be denied. See *Case v. Kelly*, 133 U. S. 21. But such is not the case. The agreement of the parties has been fully executed.

Section 1068 declares that:

“Every corporation, in respect to which it is not otherwise provided, shall have perpetual succession and a common seal . . . ; that it may contract and be contracted with, purchase, hold, and grant estates, real and personal, and make ordinances, by-laws and regulations . . . for the management of its estates, and the due and orderly conducting of its affairs.”

This section is but declaratory of the common law.

Section 1070 declares:

“No incorporated company shall hold any more real estate than is proper for the purposes for which it is incorporated,” &c.



This again is but a recognition of the common law principle.

Section 1072 provides the mode in which a company incorporated for internal improvement may enter upon land for the purpose of examining and surveying it.

Section 1073 has already been quoted in full.

That the conveyance of this land to the Louisville & Nashville R. R. Co. was not void is abundantly established by authority.

In the case of *The Banks v. Poitiaux*, 3 Rand. 136, it appears that the banks were by their charters authorized to hold such real estate "as was requisite for their immediate accommodation in relation to the convenient transacting of their business." Upon the lands purchased by the banks in that case they proceeded to erect buildings for the transaction of their business, and on either side of the buildings so erected there remained a vacant space, which they sold to the appellee; he failing to pay as agreed, the bank filed a bill for specific performance, and the chancellor decreed that the banks had exceeded their powers in purchasing and selling the property in question, it not being necessary in relation to the transaction of their business. Upon appeal it was held that while the power to acquire may be limited, restrained or prohibited, either by the charter creating the corporation or by a general law, such was not the effect of the charters in question, because the acts creating the charters are, with respect to the quantity of real estate which they were capable of holding, only directory.

"They impose no penalty in terms. They do not declare the purchase by, or conveyance to, the banks to be void, nor vest the title in the Commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might, for that cause, be dissolved by a proceeding at the suit of the Commonwealth; and even in that case, it seems to be the better opinion, the property, if not previously conveyed to some other, would revert, upon the dissolution of the corporation, to the grantor, and not to the Commonwealth. But, any conveyance made by the corporation, before its dissolution, would be effectual to pass its title. The banks have, therefore, a title which they can convey to the appellee, and which would, in his hands, be indefeasible. It would seem extremely inconvenient, if every contractor with one of these banks could, for the purpose of avoiding his contract, institute the enquiry whether the bank had violated its charter."

In *Silver Lake Bank v. North*, 4 Johnson's Reports, the same principle is recognized.

In *Bank v. Matthews*, 98 U. S. 621, it is said: "Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void."

In *Mallett v. Simpson*, 94 N. C. 37, it was held that although a cor-

poration is forbidden by its charter to hold real estate, yet a deed of land to it is valid, "and even when the right to *acquire* real property is limited by the charter, and the corporation transcends its power in that respect, a conveyance to it is not void, but only the sovereign can object. It is valid until assailed in a direct proceeding instituted by the sovereign for that purpose."

In *Nat. Bank v. Whitney*, 103 U. S. 99, the bank had taken security upon real estate for a loan which it was prohibited to do by the National Banking Law. Mr. Justice Field, delivering the opinion, said that "the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision." And, after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the Government against them, the court held that the prohibitory clauses of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the Government. . . . "That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

In *Fritts et als. v. Palmer*, 132 U. S. 282, it is said by Mr. Justice Harlan, "that where a corporation is incompetent by its charter to *take a title to real estate*, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

The text writers are to the same effect. In 1 Beach on Corp., Sec. 378, it is said:

"No party except the State can object that a corporation is holding real estate in excess of its rights. Accordingly, under an Act which forbids a foreign corporation to 'acquire and hold' real estate, a deed of conveyance of land to such corporation is not void. It passes the title, and the corporation may hold the land subject to the Commonwealth's right to escheat. The Commonwealth alone can object to the legal capacity of a corporation to hold real estate. There must be a direct proceeding by the State for the purpose of vacating the deed."

In Thompson on Corporations, Sec. 5795, it is said:

"Although a corporation may be disabled or forbidden from holding land at all, or from holding land for particular purposes, or from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the State alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the State for that purpose."

And in Sec. 5797, it is said:

“Although the State might, in a direct proceeding for that purpose, have overthrown the title of the corporation and escheated the property to its own use, yet, not having done so, the corporation may in the meantime convey an indefeasible title to another, of whatever estate in the lands had been conveyed to or acquired by it.”

The doctrine that the State alone can interfere seems to rest upon the principle suggested in *The Banks v. Poitiaux*, *supra*, that it would be extremely inconvenient if every contractor with corporations might, for the purpose of avoiding their contracts, be permitted to institute enquiry as to violations of the charter. It is a question which concerns public interests, and the State alone is competent to protect and defend them. *Runyan v. The Lessee of Coster*, 14 Peters, 122; *Wroten's Assignee v. Armat & als.*, 31 Gratt. 251.

Enough has been said to show that the conveyance to the Louisville & Nashville Railroad Company was not void, but that it served to vest the title in the appellant.

Is the deed voidable? As we have seen in discussing this first branch of this assignment of error, no one can be heard to question the right of a corporation to acquire and hold real estate, except the State by which the corporation was created, or that State within whose limits and by whose permission or authority, express or implied, it does business, and it must do so by a direct proceeding instituted for that purpose.

There is much plausibility in the suggestion of the appellee that Sec. 1073 was designed to prohibit the acquisition of real estate by means of the exercise of the right of eminent domain, or by condemnation, as it is called, except to the extent and within the limits and in the mode appointed by that section.

By Sec. 1068 corporations are authorized to purchase and hold real estate without any limitation whatsoever; by Sec. 1070 they are prohibited to hold more real estate than is proper for the purposes for which they are incorporated. In order to give full effect to these sections as well as to Sec. 1070, there is much room to contend that the first regulates the acquisition of real estate by contract, and that the last applies to proceedings by corporations for the condemnation of real estate.

But, granting that Sec. 1073 applies to the acquisition by corporations of real estate without respect to the mode of acquisition, none of the sections referred to declare that the title shall be void. As was said in *The Banks v. Poitiaux*, the statute law is only directory in this respect. It imposes no penalty in terms. It does not declare the purchase by or the conveyance to the banks to be void, nor vest the title in the Commonwealth in consequence of such purchase and conveyance. The only penalty incurred is that which waits upon every violation of its charter by an incorporated institution. The impending danger of a judgment of ouster and dissolution is, we think, the only check contemplated by the law. That has always been the punishment

prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority may see fit to enforce its application. See *National Bank v. Whitney*, *supra*.

The statute of mortmain has never been adopted into the jurisprudence of this State. Lomax's Dig., 2 ed., p. 815; *Rivanna Navigation Co. v. Dawson*, 3 Gratt. 21; *Conrad v. Marshall*, 5 Call, 364. It is safe to say, therefore, that there is no proceeding authorized by the common law of Virginia under which lands acquired by a corporation in violation of its charter can be forfeited to the State.

Is there any statutory authority by which it can be done? Chapter 105 of the Code is upon the subject of "Escheats and Property Derelict." It provides for the appointment of an escheator in every county; and Sec. 2374 directs each commissioner of the revenue annually to furnish the escheator of his county or corporation with "a list of all lands within his district of which any person shall have died seized of an estate of inheritance intestate, and without any known heir, or to which no person is known by him to be entitled."

We have seen that by the deed from Flanary and wife the title passed to and vested in Smith as the agent of the Louisville & Nashville R. R. Co., and by a subsequent deed it was conveyed to the Louisville & Nashville R. R. Co. directly. The land in controversy, therefore, does not come within the terms of the section just quoted, for the commissioner of the revenue could not in the face of the conveyances of record rightfully say that there is no person known by him to be entitled to it.

It appears further that this property has been conveyed by deed from the appellee to the appellant, and that no proceedings have been taken by the State to revoke the privileges given the appellee by the Act of Assembly before referred to. Acts of Special Session 1887, p. 19. The deed of the Louisville & Nashville R. R. Co. was, therefore, effectual to pass its title to the land in controversy and vest it in the Fayette Land Company. See *The Banks v. Poitiaux*, 3 Rand. at page 142; and 5 Thomp. Com. on the Law of Corp., Sec. 5797, and cases there cited.

We are of opinion, therefore, that the seventh assignment of error is not well taken, and, upon the whole case, the decree complained of must be affirmed.

*Affirmed.*

## SECTION III.

*Ultra Vires Lease. Remedies in Case of Repudiation by either Party before the Expiration of the Term.*

## THOMAS v. WEST JERSEY R. CO.

1879. 101 U. S. 71.<sup>1</sup>

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of covenant, by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove the following facts:—

On the eighth day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the legislature of New Jersey, March 9, 1859, entered into an agreement with them, whereby it was stipulated that the company should, and did thereby, lease its road, buildings, and rolling-stock to them for twenty years from the 1st of August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiffs so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by, and justly and equitably due to them, by reason of such termination thereof; that in the event of a difference of opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be final, conclusive, and binding upon the parties.

On the 12th of October, 1867, articles of agreement were entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

On the 18th of March, 1868, the legislature of New Jersey passed an act whereby it was enacted that, upon the fulfilment of certain pre-

<sup>1</sup> Statement abridged. Argument and part of opinion omitted. — Ed.

liminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, "subject to all the debts, liabilities, and obligations of both of said companies." The conditions required by that act were fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the 1st of April, 1868.

On April 13, 1868, and again on May 22 of the same year, notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. The latter company refused to comply with the terms of either notice; but subsequently, on the 21st of December, 1868, an agreement of submission was entered into between the plaintiffs and the latter company, whereby H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties. These arbitrators disagreeing, called in a third, who joined with said Baird in an award, by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof to and by the plaintiffs, was adjudged to be the sum of \$159,437.07; and the West Jersey Railroad Company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted and sued out this writ.

*George W. Biddle, and A. Sydney Biddle, for plaintiffs in error.*

*Samuel Dickson, contra.*

MILLER, J. The ground on which the court held the contract to be void and on which the ruling is supported in argument here, is, that the contract amounted to a lease, by which the railroad, rolling-stock, and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:—

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts."

This is no more than saying, "you may do the business of carrying goods and passengers, and may make contracts for doing that business.

Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy.

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been

fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler* (22 N. Y. 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court.

*Judgment Affirmed.*

MR. JUSTICE BRADLEY did not sit in this case.



AMERICAN UNION TELEGRAPH CO. v. UNION  
PACIFIC R. CO.1880. 1 *McCrary's U. S. Circuit Court Reports*, 188.<sup>1</sup>

## MOTION for injunction.

The Union Pacific Railroad Co. was chartered by Congress, with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances." The U. S. endowed the corporation with large grants of lands and bonds to aid in the construction, and imposed upon the corporation the duty of reimbursing the government from the earnings of the road and telegraph line. In 1866 the U. P. R. Co. leased to the Am. Union Tel. Co. all its telegraph lines, wires, poles, &c. for the whole term of the R. R. Co.'s charter and any renewals thereof; subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that plaintiff would fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States. The R. R. Co. received a valuable consideration in stock of the Telegraph Co., which stock the R. R. Co. applied to its own use. In Feb. 1880, the R. R. Co. assumed, of its own motion, to rescind the lease, and to resume possession and control of the property; for which purpose its agents cut certain wires running from plaintiff's offices to the main line. The Telegraph Co. filed a bill; praying, *inter alia*, for an injunction to restrain the defendants from disregarding the above contract, and from interfering with the property covered thereby, and from preventing plaintiff from reconnecting the wires, so as to restore them to their original condition before the same were cut. The defendants answered, affidavits were filed, and a full hearing was had upon the application for injunction (a temporary injunction having been allowed).

*Williams & Thompson*, and *C. Beckwith*, for plaintiffs.

*John F. Dillon*, *Sidney Bartlett*, *J. P. Usher*, and *A. J. Poppleton*, for defendants.

## MCCRARY, CIRCUIT JUDGE.

[The learned Judge *held*, that the power which the charter confers, to "construct, furnish, maintain, and enjoy a continuous railroad and telegraph," was personal, and carried with it a duty and obligation which could not be transferred; that the contract of lease was *ultra vires*, because it transferred from the company property which was necessary to the performance by the company of its public duties; and also because it attempted to transfer certain franchises of the company,

<sup>1</sup> Statement abridged from opinion. Arguments and part of opinion omitted.  
— ED.

viz. the right to operate a telegraph line and to fix and collect tolls for the use of the same. The remainder of the opinion is as follows:]

This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices, and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject-matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject-matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law, a contract, *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard*, 55 Ill. 417.

And in the case of *Thomas v. R. Co.* (Supreme Court U. S.), already quoted from at length, Mr. Justice Miller, upon this point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler*, 22 N. Y. 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely,

the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder*, 45 Mo. 505; *Varick v. New York*, 4 Johns. Ch. 53; *Dudley v. Trustees*, 12 B. Mon. 610; *Farmers v. Reno*, 53 Pa. St. 224; *Sunsing v. Steamboat Co.*, 7 Johns. Ch. 162.

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds

above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

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ST. LOUIS, VANDALIA, & TERRE HAUTE R. CO. v. TERRE HAUTE & INDIANAPOLIS R. CO.

1892. 145 U. S. 393.<sup>1</sup>

APPEAL from U. S. Circuit Court for the Southern District of Illinois.

Bill in equity, filed in 1887, by an Illinois corporation against an Indiana corporation, to set aside and cancel a conveyance, or lease, of the plaintiff's railroad and franchises to the defendant for a term of 999 years. The lease was made in 1868. The defendants took possession of the road shortly after the execution of the lease, and have ever since operated it. The bill, as amended, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property. A demurrer to the bill was sustained by the Circuit Court (33 Federal Reporter, 440).

*Lyman Trumbull, John M. Butler, Henry S. Robbins, and Perry Trumbull*, for appellant.

*George Hoadly*, for appellee.

GRAY, J. The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both of the parties.

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorised by the State which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway v. Oregonian Railway*, 130 U. S. 1; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited.

[After discussing the question whether the contract was beyond the corporate powers of either party, the opinion continues as follows:]

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts, not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy v. Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co. v. Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co. v. St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co. v. Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway v. Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokerage bonds, as in *Drury v. Hooke*, 1 Vernon, 412, and *Smith v. Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith v. Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service, as in *Morris v. McCulloch*, Ambler, 433; *S. C.* 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham v. Ox*, 1 Ves. Sen. 276; *St. John v. St. John*, 11 Ves. 526, 536; *Cone v. Russell*, 3 Dickinson (48 N. J. Eq.), 208. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than

the defendant. *Osborne v. Williams*, 18 Ves. 379, 382. And *Morris v. McCulloch* can hardly be reconciled with his decision in *Thomson v. Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defence in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defence effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defence. Story Eq. Jur. § 700 *a*, and cases cited; *Simpson v. Howden*, 3 Myl. & Cr. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester v. Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood v. Fisk*, 101 Mass. 363; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Merionetshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers

which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Birkenhead &c. Railway*, 2 Hall & Twells, 450; *S. C.* 2 Maen. & Gord. 146; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory v. Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

*Decree affirmed.*

## SECTION IV.

*Bequest to Corporation in Excess of Charter Authority.*TRUSTEES OF DAVIDSON COLLEGE *v.* EXECUTORS AND  
NEXT OF KIN OF MAXWELL CHAMBERS.1857. 3 *Jones Equity (North Carolina)*, 253.<sup>1</sup>

BILL in equity, commenced in the Court of Equity of Rowan, and removed to this Court by consent. The bill was originally brought against the executors of Chambers, alleging that, by the will of Chambers, legacies to a large amount were bequeathed to plaintiffs, and that assets sufficient to pay the same had come to the hands of the executors; and praying that the defendants might be decreed to pay over the same. The cause was set down for hearing upon the bill, answer, and exhibit. The Court remanded the case for the purpose of making additional parties.

The cause was remanded to the Court of Equity of Rowan, and in that Court the bill was amended, according to the suggestion of this Court, by making the next of kin and the heirs-at-law of Maxwell Chambers, parties defendant. Process was also issued to the Attorney General as the representative of the State, and to the trustees of the University.

Process was also served on several persons as heirs-at-law, but it appearing that they were not such, their answers were withdrawn.

Most of the heirs-at-law live out of the State, and were not known to the counsel when the pleadings were sent up. It not being essential to a proper consideration of the case that they should be before the Court, the cause proceeded without them.

The answer of the next of kin was filed, not dissenting from any allegation of fact made by the plaintiffs, and submitting to such decree as the Court might think just and proper.

The cause was set for hearing and sent up by consent.

An Act of Assembly passed at the last session of the Legislature, extending the corporate capacity of the plaintiffs, so as to enable them to hold property to the amount of \$500,000, and relinquishing to the plaintiffs any interest which the State or University might have in the fund, was agreed to be considered as regularly pleaded.

The cause was again argued at December Term, 1856.

*Graham, Osborne and Wilson*, for the plaintiffs.

*Winston, sr.*, for the executors.

*Jones*, for the next of kin.

<sup>1</sup> Statement abridged. Portions of the opinions omitted. — Ed.



*Bailey, Attorney General*, filed a copy of the Act of Assembly above mentioned, and declined further appearing.

*Advisari.* — At this term the opinions were delivered.

PEARSON, J. The charter of the college (act of 1838) enacts among other things: sec. 1, "The trustees of Davidson College shall be able and capable to purchase, have, receive, take, hold, and enjoy in fee simple or lesser estates, any land, &c., by gift, grant, devise, &c.; and shall be able and capable, in law, to take, receive, and possess all moneys, goods and chattels, that have been, or shall hereafter be given, sold or bequeathed, for the use of said college, &c." Sec. 10. "Be it further enacted, that the *whole amount of real and personal estate belonging to said college, shall not at any one time exceed in value, the sum of two hundred thousand dollars.*"

These words express, very clearly, the intention of the Legislature, that this college shall not own, at any one time, more than two hundred thousand dollars' worth of property. The motives for making this restriction, and the policy upon which it is based, are not open to enquiry by us. The restriction is made by the act which creates the corporation, and our consideration is confined to its legal effect.

The testator, besides a devise of a large amount of real estate, bequeaths, for the use of the college, a *fund of personalty*, which, when added to the property owned by the college at the time of his death, will greatly exceed \$200,000. We have this question: Is there any principle upon which this Court can declare, that the college is entitled to the excess of the fund, after the \$200,000 is fully made up, and decree that the executors shall pay over such excess for the use of the college? or are the next of kin of the testator entitled to the excess, on the ground, that it is not effectually disposed of by the will?

The general rule is well settled: When a legacy, from any cause, fails to take effect, the subject devolves upon the next of kin of the testator, as property undisposed of; for an ineffectual disposition is no disposition at all. For instance, if a legacy fails by "lapse," i. e., the death of the legatee in the life time of the testator; or by reason of its vagueness, as when the object of the bounty is not sufficiently described to enable the Court to say who is to take beneficially; *Bridges v. Pleasants*, 4 Ire. Eq. 26, where the object was "the poor saints;" or because the purpose of the testator is against the policy of the law, i. e., to establish an order of privileged slaves; *Lea v. Brown*, ante, 142; or, where those for whose benefit the bounty was intended, refuse to accept it; *McAuley v. Wilson*, 1 Dev. Eq., 276; or, where those for whose benefit the bounty is intended are *positively forbidden by law from owning it*, which is our case — made stronger, if possible, by the fact, that the prohibition is expressed in the very act by which the corporation is created.

The mere statement of the proposition seems sufficient for its solution; but as the amount involved is large, and the question a new one, we desired to hear all that could be said upon it, and to have the

authorities examined; for that purpose, as there was not a full argument at the first term, we directed the next of kin and others to be made parties, and requested a second argument, suggesting in general terms, that there might be a distinction between conveyances executed inter vivos, and, possibly, devises; to which class of cases we had been referred, as establishing the distinction between a *capacity* "to take" and "to hold" real estate, and the devolution of property by act of law, and wills of personalty.

We are satisfied, after hearing a full argument in behalf of the college, that there is no principle upon which a decree can be made in its favor, in respect to the excess of the fund. In England, under the doctrine of *cy pres*, the Chancellor would direct the excess to be applied to some other charity, as near as might be, like that indicated by the testator, and if no other male Presbyterian college existed, it would be applied to a female college of that denomination. *Attorney General v. Tonna*, 2 Ves. Jun. 1; 4 Bro. C. C. 103; but our Court has never acted upon that refinement. *McAuley v. Wilson*, sup.

The cases of *purchases* of land by aliens and corporations, under the statutes of mortmain, are not in point. It is settled, that an alien or a corporation may, by purchase, *take* land, but cannot *hold*; and the doctrine is put on the ground, that if one by an *executed conveyance*, which is *his own act*, passes land to an alien, or corporation, he shall not have it back; but it shall belong to the sovereign, upon office found. It is otherwise in regard to the *act of law*. If the heir, of one dying seized of land, be an alien, the law will not cast the descent on him, because he cannot hold beneficially, and the law will not give with one hand and take away with the other, but will cast the descent upon the next relation who is capable of holding. For the same reason, an alien husband does not take as tenant by the curtesy, nor an alien wife take dower.

In the case of a will of personalty, the property does not pass directly to the legatee; and the law will not require, or permit, the executor to assent to the legacy, unless it can take effect beneficially, according to the intention of the testator; but it devolves upon the next of kin, by the general rule, stated and illustrated above.

It was said, in the argument, that as the testator's object was a good one — the encouragement of learning, and his intention to give this fund to the college was clear, the Court should so decree, without looking at the consequences, and leave the question, as to whether the college violated its charter by taking it, to be settled upon proceedings instituted for that purpose, if the sovereign should see proper to do so. The reply to the first proposition is: The encouragement of learning is, in general, a good object, but it ceases to be so, when it becomes necessary to violate a positive law. To the second: This Court is a co-ordinate branch of the government; it may be, that had this property been vested in the college by a direct gift inter vivos, the power of the Court could not have been called into action, except upon proceedings

instituted by another branch of the government; but as a case is now instituted, it must exercise its power, and there is a solemn obligation resting upon it, not to aid, or sanction, a violation of the law, upon the suggestion that another department of the government can more properly see to its redress.

But it is asked: Are the plaintiffs in a worse condition, because the executors declined to pay over the fund without being protected by the sanction of this Court, than if they had been willing to take the responsibility of paying it over without suit? Certainly not. Upon the death of the testator, without having effectually disposed of this fund, the rights of the next of kin "*were vested.*" They could have filed a bill to prevent the executor from paying it over, or to follow the fund in the hands of the plaintiffs. This is also a full answer to the position, that the act of the Legislature, at its last session, by which the college is allowed to own property to the value of \$500,000, and all right to the fund on the part of the State or of the University is relinquished, removes the objection to the plaintiffs' recovery. The rights of the next of kin being vested, the act of the Legislature does not in anywise affect them; so, the only effect of the act, besides enlarging the amount which the college is now capable of owning, is to waive any right of the State; but as we have seen, the State had none.

This being a bill against the executors only, the personalty was directly involved; but upon a suggestion, that the heirs-at-law might have an interest in the question, whether the full amount of the \$200,000 should be made up out of the personalty alone, or out of the personalty and realty devised, by rateable contribution, it was directed that they should be made parties. We are satisfied that the personalty is the primary fund, and the requisite amount must be made up out of that exclusively; for which the necessary enquiry will be directed. The bill will be dismissed as to the heirs, without costs, as they claim the legal title to the land. The question between them and the college may be presented in an action of ejectment, if the parties are so advised.

BATTLE, J.

Hence, in England, and perhaps in this State, an alien might take real property by devise, which would give him a good title to it, as against all persons but the sovereign. In analogy to this, the counsel for the plaintiffs have contended that their clients have the right to take the whole legacy bequeathed to them by Mr. Chambers, though it may be that by force of the restrictive clause in their charter, the State might, if it saw fit, take from them the excess over the value of the property which they were authorized to own. The argument would have much force — perhaps be irresistible — if the legacy vested at once and immediately, under the will, in the plaintiffs. Such is the case undoubtedly in a devise of land. The devisee takes in at once by

force of the will, and his title becomes complete immediately upon the death of the deviser. But the case of a legacy is well known to be different. Upon the testator's death, all his personal property becomes vested in the executor, who holds it in trust, first, for the payment of the funeral expenses, charges of administration and debts, and then for the payment of legacies; and if there be a residue undisposed of by the will, he is bound, since the act of 1789, (see 1 Rev. Stat. ch. 46, sec. 18; Rev. Code, ch. 46, sec. 24), to pay it over to the next of kin. The legatee has no legal title to the legacy until the executor shall give his assent to it. So strong is this rule, that if a legatee take into possession a specific chattel, given to him by the will, without the consent of the executor, the latter may by a suit at law recover it back; 2 Williams on Ex'rs., 845. It is true, that if, after the payment of all the debts and other legal charges upon the estate, the executor withholds his assent to a legacy, the legatee may, by a bill in equity, compel him to assent to it, and thereby give him a title to it; but it is by means of a suit in equity alone that he can get possession of a legacy, either general or specific, from an obstinate or dilatory executor. It needs the aid of a court, then, to enable the plaintiffs to recover the legacy which they claim; and the analogy to the case of an alien cannot be of much avail to them, unless we find that the law will *per se* and *proprio vigore* cast an estate upon him, or that a court either of law or equity, will lend him its assistance to obtain it.

It seems to me, that, in admitting that the State, upon office found, or otherwise, may seize and take to its own use, the excess, the plaintiffs' counsel virtually admit that it is unlawfully held by the college. Why so forfeited to the State unless because the college has it in opposition to the express prohibition of its charter? If unlawful for the plaintiffs to have it, can a court of equity assist them to get it? I have, in vain, tried to discover a principle upon which the claim of the plaintiffs can be supported. The analogies of the common law are against it. It is well settled, and well known, that a contract, the consideration of which induces to the doing of an act, either *malum in se*, or *malum prohibitum*, is void, and no action at law can be sustained upon it. See *Ingram v. Ingram*, 4 Jones' Rep. 188, and the cases therein referred to. Will the court of equity be less sensitive to the duty of upholding the law, or less alive to the importance of preventing its violation? I have studied its principles to little purpose if it be so.

NASH, C. J., *dissentiente*.

Secondly. Let it be granted, that by taking the whole of the property devised, the total amount in value would exceed what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendants, the executor, or the next of kin, take advantage of

the breach of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties or their privies, can take advantage of a breach of a condition. Now, neither Mr. Chambers, nor his executor, nor his next of kin, are any parties or privies to the contract—upon what principle then, is it, that the executor can refuse his assent to the legacy to the college, or upon what principle can the next of kin claim it, or any portion of it? If Mr. Chambers, while in life, had donated to the college two hundred thousand dollars in cash—or its value in property, specified in the will, could he have been heard in a court of justice to say, that he had given the corporation too much, and they must pay back to him as much of the donation as was over and above what it could legally hold or retain? Suppose him to have brought an action for the surplus, could he have recovered? Surely not. He would be estopped, and of course, so would all persons claiming under him; *Gilliam v. Bird*, 8 Ire. Rep. 280. His death cannot alter the proposition. Whatever would estop him, must estop his personal representative, and must equally estop his next of kin, who claim through him. I cannot, therefore, see how either the next of kin or the executor of Maxwell Chambers, can deny, in this proceeding, the right of the complainants to receive the whole of the sum devised them.

But again, I hold that no one but the State, as a sovereign, can call the plaintiffs to account for receiving, or holding, a larger amount of property in value than is limited in their charter.

It is objected that a Court of Equity will not lend its aid to the corporation to enable it to violate its charter. Certainly it will not. But, with great respect, it strikes me that principle cannot apply here. [The learned Judge here contrasted *Bank of Michigan v. Niles*, 1 Douglas, 401, cited by defendants, with *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; and then proceeded as follows:] The authority of the case in Douglas is neutralized by that in Serg. and Rawle, and it differs from the one before us. In that, the bill was brought to compel the performance of a contract; in this, to compel the executor to execute a trust by paying over a legacy. But whatever doubt might rest upon the case, is, in my opinion, entirely removed by the act of '56, ch. 94. See laws of the State for '56, p. 96. The act in its caption professed to be made to amend the act of '38 chartering Davidson College. By the first section, the 10th section of the act of '38 is repealed; by the 2nd, the power of the corporation to purchase real and personal property is enlarged to \$500,000; and by the 3rd section, the State releases and conveys to the corporation, all right, title and interest which the State had or might have, in and to the estate and property derived to it by the will of Mr. Chambers. This act is tantamount to a license by the Crown, and we have seen by the case from 3rd Vesey, jr., and that from Merivale, that a license

from the Crown will enable a corporation to hold more property than the amount to which it was originally limited, (though the license was obtained after the death of the donor), upon the principle that, by the devise or purchase of more property than they were allowed to hold, the legal estate vested in the donee, subject to the will of the Sovereign.

It is further objected, that the act of '56 could not divest the next of kin of the interest which vested in them at the death of the testator. The above cases show that no interest vested in the next of kin, for it is decided in them, that the legal estate vested in the donees. But there is another answer to this claim of the next of kin. It is in *general* true that a devise ought to take effect on the death of the testator; but a devise to a collegiate corporation, not then in existence, *may* be good. Grant on Corporations, 123; *Attorney General v. Downing*, Wilmot's notes, 11 and 13. In that case, the devise was to a corporation, to be established in the University of Cambridge, and to be named after the testator, Downing College, in case the Crown should grant a charter incorporating the same, and a license to hold land in mortmain. The devise was held to be good. Here, the corporation was in full existence at the time the will was executed and when the testator died. The result of the cases to which reference has been had, is that a corporation may take more than the limit in their charter, but they cannot hold it unless they obtain an extension by the Crown. Grant, 104. No right to any interest then, according to the authorities, did or could vest in the next of kin. It is only on the ground, that the sum devised to the corporation, taken in connection with the property they already possessed, would exceed the amount they were entitled by their original charter to hold, that the next of kin found their claim to the surplus. And the very objection by the next of kin, that Equity will not assist the corporation to do a wrong, shows the fallacy of the objection we are now considering. It cannot be that the mere devise could constitute a breach of the charter. To effect that, there must be some *act* of the corporation; and at the time of the death of the testator, they had committed no such act. And if, upon the enquiry directed by the Court, it should appear that in fact the property held by the corporation does not exceed the limit specified in the original charter, then, surely, the next of kin had no vested right to be disturbed by the act of '56, for there would have been nothing to vest. But, apart from this, we have seen, from the cases from 3rd Vesey, Jr., and 2nd Merivale, and those cited from Shelford and others, that although a corporation holds more land than, by its charter, it is entitled to hold, the legal title is in the corporation, and the heir has none. If then, in this case, there was no breach by the plaintiffs of the charter under which they claim, (and there can be none, for they have not yet received any portion of the donation), then there can be no valid claim on the part of the next of kin; for the devise is perfect and not imperfect. If the charter has been violated,

no one but the sovereign can claim the forfeiture ; and as the sovereign, by the act of '56, has waived its right to vacate the charter, if there was any violation of it by the corporation, the right of the plaintiffs to receive the donation from the executor, is complete, and put beyond all doubt in my estimation.

PER CURIAM. Decree according to the opinion of the Court.

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IN THE MATTER OF THE ESTATE OF JOHN MCGRAW.  
IN THE MATTER OF THE ESTATE OF JENNIE  
MCGRAW FISKE.

1888. 111 *New York*, 66.<sup>1</sup>

APPEAL from a judgment of the Supreme Court, which reversed a decree made by the Surrogate of Tompkins County on the settlement of the account of Douglass Boardman, executor of the will of Mrs. Jennie McGraw Fiske. The will of Mrs. Fiske directed that her estate "be converted into money, or available securities, as soon as can be done, having in view its best interests and results." After numerous bequests including a bequest of \$250,000 to Cornell University in trust, the will contains the following residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses and conditions hereinbefore prescribed for said fund."

† The Revised Statutes provide that a devise of real estate may be made to every person capable by law of holding real estate ; "but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." (2 R. S. 57, ss. 1, 2, 3.) The Revised Statutes also enact, that the trustees of every college chartered by the state shall have power "to take and hold, by gift, grant, or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars." (1 R. S. 460, ss. 31-37.) Cornell University was incorporated by chapter 585 of the Laws of 1865. Section 5 of the charter is as follows: "Sec. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate."

The husband, next of kin, and heirs at law, of Mrs. Fiske, contended that Cornell University, at the date of Mrs. Fiske's death,

<sup>1</sup> Statement compiled from statement and opinion in 111 *N. Y.* 66, and statement in 45 *Hun*, 354. Arguments and portions of opinion omitted. — Ed.

already owned property exceeding, in the aggregate, three millions of dollars.

The amount of Mrs. Fiske's estate at the time of her death, as found by the Surrogate (including a trust fund created under the will of John McGraw, which the Surrogate held was part of the estate of John McGraw, but which Mrs. Fiske had a right to dispose of by will) exceeded two millions of dollars. After deducting the legacies to parties other than Cornell University, there was a balance of more than one million which would go to the University if the will were carried out.

The Surrogate decided that a decree should be made:

1. That the account of the executor be allowed.
2. That the executor pay over to Cornell University the sum of \$141,676.72, being the balance on hand and ready for distribution.
3. And adjudging that Cornell University is the owner and entitled to all the rest, residue and remainder of said estate, and directing said executor to pay the same, when sold, to Cornell University, in money or in such other form, or at such other time, as may be mutually agreed upon between Cornell University and the executor.

The decree of the Surrogate was reversed, upon appeal, by the General Term of the Supreme Court in the Fourth Judicial Department. (Reported 45 Hun, 354.) The case was then taken, by appeal, to the Court of Appeals.

*E. Countryman*, and *S. D. Halliday*, for appellants.

*Esek Cowen*, and *George F. Comstock*, for respondents.

PECKHAM, J.

I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And if there were nothing said on the subject of property in the charter, I think the Revised Statutes as to the limitation for colleges would apply. Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property, and the counsel for the appellant admits that if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold.

Looking for a moment outside of and beyond the statute laws of the state, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction in the case at least of a corporation, between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: A corporation at common law could take and hold property by devise. At



an early stage in the history of the law of England, relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was enacted that no man should alien his feud to a corporation under penalty of a forfeiture thereof to his next superior, of whom he held the land, and in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on until the king, as the general superior and lord of all, was reached. But in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He therefore insists that this distinction between taking and holding strengthens his claim that the use of the word *hold* in the charter was intentional and for the specific purpose of permitting the corporation to *take* an unlimited amount of property and to *hold* only the amount specified. No sound reason for giving such unlimited power to *take*, while limiting the power to *hold*, can, as it seems to me, be stated. And if such were the intent, I think it would have been plainly stated in the charter instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction, as existing in relation to the English corporations subject to the mortmain statutes, and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture. The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain was that of a forfeiture of the land to the next superior of the grantor, and so on up to the king; and the counsel claims that in this state, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding more is that the state representing the whole people and standing in this respect in lieu of the king (there being no mesne lords), can forfeit the charter of the corporation and thus prevent the further holding. And assuming this to be the fact, he uses it as strengthening his argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who have no interest therein. It is said that it is a matter for the state alone to take cognizance of, and until it does the corporation holds the property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the law of mortmain in England and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except

by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein, limiting the holding of property, is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first mortmain act was placed in Magna Charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must be accomplished by *an entry*, and then and from that time, there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. (Shelford on Mortmain, 8, 34; 1 Kyd on Corp. 81; Grant on Corp. 106.)

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this State holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. (Const. of N. Y., art. 1, § 13.) The escheat takes place when the title to lands fails through defect of heirs. (Const. of N. Y., art. 1, § 11.)

A devise to a corporation which is forbidden to take (or forbidden to *hold, if the word*, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void and the land descends to the heir or residuary devisee.

We have not in this state re-enacted the statutes of mortmain or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects. (2 Kent's Com. 282.) Of course, the restrictions contained in any general law, if applicable, must also be referred to.

There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations, as is

seen in the laws of England relating to alienations in mortmain. Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount.

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of the corporation the rest of the property would (as he insists) probably go to the state because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state and of the other states of the union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case, the result being, as is stated, that the corporation has an unlimited right to take property and also an unlimited right to hold it as against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. (*Wright v. Saddler*, 20 N. Y. 320.)

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold, the meaning being that it cannot hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this state, seems to me a plain proposition.

The counsel has, however, with great industry and research, cited a number of cases from our own courts and those in other states, where this distinction, he claims, has been admitted, and in cases, too, where the principles involved were similar to the case at bar (one or two being, he says, precisely like it), and where it has been held that in such cases, although the corporation has violated the law of its being, yet no one but the state could take advantage thereof.

I think that, with the exception of one case, they were all entirely different from this one, and the decisions were based upon a totally different and probably a perfectly unassailable ground.

The principal case, or at least one of the early ones, is that of *Leazure v. Hillegas* (7 S. & R. 313), which arose in Pennsylvania and was decided in 1821.

The court there held that some portions of the mortmain laws of England were in force in Pennsylvania, to the extent of permitting the state, as the sovereign lord, there being no mesne lords, to enter and claim the forfeiture, and that until the state did so, the title of the corporation was good, and it could convey such a title to its grantee. No such laws have been in force in this state.

Under the modern acceptance of the law regarding corporations, this case could probably be supported on an entirely different ground, viz., that it was an executed contract or conveyance, upon a good consideration, and that the grantor could not be heard to dispute his own grant under the circumstances; and that no one could take advantage of this violation of its charter by the corporation excepting the state, which could proceed to forfeit the charter because thereof. The case is no authority in this state for the proposition that none but the state can interfere, nor is it of any importance upon the question as to how material it is to note the absence of an express limitation in words upon the power to take property under the charter of the university.

There is one case, however, which has been decided by the Supreme Court of the United States upon the question of who may take advantage of a violation of the charter in relation to the power to hold property, which comes very near the case at bar. The decision of that court goes quite a distance towards sustaining the contention of the appellant's counsel, although there was another ground upon which the decision could rest. The very great respect which we all feel for any decision of the Federal Court of last resort, and for any opinion given by its learned and able judges, even in cases where it is not binding upon us, renders it necessary to examine the case with some care. The case is *Jones v. Habersham* (107 U. S. 174).

[The learned Judge then stated *Jones v. Habersham*, and commented on the cases referred to in the opinion given in that case.]

The other cases cited in the printed argument of the counsel for the appellant, are mostly cases where a corporation has contracted with

parties on a valid consideration, and where a conveyance has been made and then it is sought to raise the question as to the power of the corporation to take or convey a title, and it has been held that in such cases of an executed contract, if the corporation has violated the statute, the parties seeking to set up such violation would not be heard, and in such case none but the state would be. That one who contracts with a corporation shall not, under such circumstances, be heard to raise the question, is, in substance, the principle decided.

Such are the cases, in substance and principle, of *Cowell v. Springs Co.* (100 U. S. 55); *Hough v. Cook Co. Land Co.* (73 Ill. 23); *Alexander v. Tolleston Club of Chicago* (110 id. 65); *Barnes v. Suddard* (117 id. 237); *Cal. Tel. Co. v. Alta Tel. Co.* (22 Cal. 398); *Natoma Water Co. v. Clarkin* (14 id. 544); *Haywood v. Davidson* (41 Ind. 212); *Baker v. Neff* (73 id. 68); *C. B. & Q. Co. v. Lewis* (53 Iowa, 101); *Land v. Hoffman* (50 Mo. 243); *Chambers v. City of St. Louis* (29 id. 576); *Barrow v. Nashville, etc. Tel. Co.* (9 Humph. 304); *Baker v. Northwestern Guaranty Co.* (36 Minn. 185); *Missouri, etc., Co. v. Buchwell* (2 Neb. 192). I have examined all of these cases, and while the facts are, of course, not precisely similar, yet in not one of them does the fact exist of a devise of property to a corporation which it cannot hold, because the limitation has been reached provided for by statute, and, of course, no doctrine that in such a case the heirs cannot claim the property, is advanced.

In most of them the court looks upon the question as one of a forfeiture of the charter on account of a violation of some limitation therein contained, and in such case, it is said, none but the sovereign can raise such question.

The case of *Hayward v. Davidson* (41 Ind. 212), was that of a devise of real estate to county commissioners for the use of the county. The court held that the county was authorized to acquire and hold title to real property for some purposes, and it could not be made a question by any one, except the state, whether or not real estate acquired by such county has been thus acquired for authorized purposes or not. That the title passed under the power of the county to take real estate for some purposes, but the court also said if the charter or the law has forbidden a corporation to take, then a deed or devise passes no title.

In the case at bar, where the statute authorizes the corporation to hold not exceeding a limited amount, is it not the same thing, in substance, as a prohibition against holding and, therefore, a prohibition against taking any more? And when the limit is reached, is it not the same as an original prohibition against taking any? In *Chambers v. City of St. Louis* (*supra*), the court held, also, that there was a right in the city to take and hold lands, and if there were a capacity in the vendor to convey, so soon as there was a conveyance there was a complete sale, and if the corporation, in purchasing, violates or abuses the power to do so, *that is no concern of the vendor or his heirs*. It is a matter between the state and the city. This case rests upon the same principle above alluded to.

In the case of *Vidal v. Girard's Executors* (2 How. [U. S.] 127), the trusts created by the will of Stephen Girard were held valid, and the court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such fact, as that could only be done by the state by *quo warranto* or other judicial proceeding. This is upon the ground that the *trust was a valid trust*, and if so, and the corporation, as such, had no power to execute it, the trust did not, for that reason, fail, but upon the failure of the corporation for lack of power, to execute it, a court of equity would appoint a new trustee. Of course, the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its power in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property. They stood, therefore, in respect to the corporation, as any other strangers. The case does not aid the appellant upon the matter under review.

I have not yet referred to all the cases cited by the indefatigable counsel for the appellant, but I have read them all, and in not one is the question fairly up and decided in the way he asks the court to decide this case.

The counsel refers to the general doctrine of *ultra vires* in respect to corporations, and shows that, as matter of fact, corporations have power to violate the law of their existence, or, in other words, to do wrong; and he cites *Bissel v. Railroad Company* (22 N. Y. 259); *Whitney Arms Company v. Barlow* (63 id. 63); *Atlantic State Bank v. Savery* (82 id. 292); *Rider, etc., v. Roach* (97 id. 378).

The theory upon which the plea of *ultra vires* is examined is that it will not, as a general rule, prevail whether interposed for or against a corporation, when it will not advance justice but will accomplish a legal wrong. (See above cases.)

I do not perceive that any assistance accrues to the appellant from a presentation of this doctrine. There is no question between these parties of a contract nature, nor any fact which ought to preclude the respondents from setting up any legal bar to the right of the corporation to take title to property which they claim either as heirs-at-law or as legatees or devisees.

The cases of the *Elevated Railroad* (70 N. Y., 327, 338) and *Moore v. Brooklyn, etc., Railroad* (108 id. 98, 104) are cited to show that none but the sovereign can take advantage of a forfeiture of the charter, and that must be in a direct proceeding against the corporation. The principle is undenied. But in a case like this it is no forfeiture that is being insisted upon. It is simply a question of title to the property, and, provided it has not been legally devised or bequeathed, it necessarily vests in the heir or next of kin.

But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in

the corporation, for otherwise the state would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter, on the part of the state, that it was unsuccessful in continuing to hold the property against the charter provisions.

Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other states, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62.)

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it do, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that *he* stands in no position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his

heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his life-time, and in such a way that he could not question its validity, and that as *he* could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against *holding* the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation *to take*, if by *holding* it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

[After referring to the fact that the legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property.]

However perfect may be the waiver in the act alluded to, of the right of the state to forfeit the charter of this university on account of any alleged violation thereof, such act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske and before the passage of the act in question. (*White v. Howard*, 46 N. Y. 144.)

The counsel asks what is to be done in regard to the real property in other states, if we hold this corporation has no power to take any more property? It is said the surrogate has found, as a *fact*, that the university had legal capacity to take and did take by devise all the real property the title to which was in Mrs. Fiske at the time of her death, in those states. He says the title to real estate is governed by the laws of the states where the real property is situated; and that in the states in question it is held that a corporation can take under such circumstances as this case.

This will devises no real estate to Cornell University. It gives to the university \$40,000 in trust for the erection and furnishing and support and maintenance of a hospital; \$50,000, in trust, for completing and perfecting the McGraw building; \$200,000, in trust, for the McGraw library fund, and it gives and devises the residue of the property of the testatrix, if any, to be added to the last men-



tioned fund. It then directs that the estate of the testatrix shall be converted into money or available securities by her executor as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the estate of the testatrix into money or available securities, and hence no real estate in other states has been devised by her to the university. It is needless to inquire what would have been the rule in case real estate in other states had been specifically devised to the university, while this court should at the same time decide that it held property up to its charter limit, and that it had no capacity to take or hold any more real or personal property than the amount specified in its charter.

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am of the opinion that it had no power to take or hold any more real and personal property than \$3,000,000, in the aggregate.

*Second.* Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?

[The court held, that the property of the university, at the time of the decease of Mrs. Fiske, amounted to more than "its permitted aggregate"; and that, under such circumstances, the university could not take the various legacies bequeathed to it by her will.]

*Judgment of General Term affirmed.*

All concur, except FINCH, J., taking no part.

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## SECTION V.

*Suits for Specific Performance of Contracts which are in Excess of Charter Authority; or for Declarations of Trust for Purposes in Excess of Charter Authority.*

### BANK OF MICHIGAN v. NILES.

1842. *Walker's Chancery Reports (Michigan)*, 99.

THE bill in this case was filed to obtain the specific performance of a contract entered into by the parties on July 1st, 1839. The complainants bound themselves to convey to defendant, within sixty days thereafter, certain real estate described in the contract, and to obtain from one Jeremiah H. Pierson a good and sufficient deed of the Rochester mill property, and convey to him three undivided fourth parts of it;

and, in case a mortgage should be given by them on the mill property, for the purchase money, they covenanted to pay the incumbrance, and cause it to be discharged within five years. The defendant, in return, agreed to execute a mortgage to complainants for the purchase money to be paid by him, amounting to \$28,000, on the property to be conveyed, and on certain other property named in the contract. Within the sixty days, complainants purchased and obtained a deed of the mill property from Pierson, for \$5,000, which they paid and secured to be paid to him. They then made out and executed a deed to defendant for three-fourths of it, with the other property they were bound by the contract to convey to him, and were ready and willing to perform their part of the contract.

The defendant demurred.

*G. M. Williams and A. D. Fraser*, in support of the demurrer.

*J. F. Joy*, contra.

THE CHANCELLOR. The first objection made by defendant is, that the bank had no authority under its charter to make such a contract as that disclosed by the bill; and that this Court will not, for that reason, decree a performance of it.

The third section of the act of incorporation concludes with these words: "The President, Directors and Company of the Bank of Michigan shall be in law capable of purchasing, holding and conveying any estate, *real* or personal, for the *use* of the said corporation." By the ninth section it is provided, "That the lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts."

The power given by the third section to purchase, hold and convey real estate, is limited by the ninth section to specific objects. Taking the two sections together, the intention of the legislature is clear, and but one construction can be given to them. It was intended that the corporation should have power to purchase real estate for the convenient transaction of its business, or to secure a debt; but not for the purpose of investing its capital, or of speculating in lands, or of buying them merely to sell again. I have no doubt this is the true construction of the charter. A different construction would enable the corporation to buy and sell real estate at pleasure, and render entirely nugatory the restriction imposed by the ninth section. The corporation, then, exceeded its powers, and contracted to do what it had no right to do under its charter, when it covenanted to purchase the mill property of Pierson, and convey three-fourths of it to defendant. It was an agreement to buy real estate of one individual to sell to another; — a contract to violate its charter, by embarking in a business with which it had no

right to meddle; — a contract which, for that reason, this Court cannot, consistently with equitable principles, assist the complainants to carry into execution. Equity will aid no one in doing that which is unlawful.

The purchase of the mill property of Pierson for \$5,000, after the contract was made, makes no difference; for it was done under the contract, and in part performance of it. The case of *The Banks v. Poitiaux*, 3 *Rand. R.* 136, goes no further than this, that the corporation having purchased the land, might make a deed of it; not that it might make a contract with A. to purchase the lands of B., and sell them to A., which is the case before me.

It is unnecessary to decide the other questions made on the argument.

Demurrer allowed.

NOTE. This case was affirmed on appeal. [1 Douglas, Michigan, 401.]

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## CASE v. KELLY.

1890. 133 U. S. 21.<sup>1</sup>

APPEAL from the U. S. Circuit Court for the Eastern District of Wisconsin.

The plaintiff, Case, receiver of the Green Bay & Minnesota R. R. Co., was ordered by the Court (in a suit to foreclose a mortgage given by the R. R. Co.) to take possession of all the corporate property, and was authorized to bring suits in the name of the company. Case, as receiver, brought the present bill in equity, stating that he sues in behalf of the company and as receiver.

The allegations of the bill are, that the defendants Kelly, Ketchum and Hiles, who were officers of the railroad company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is, that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — ED.

defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit: to Ketchum, Kelly and Hiles, who now refuse to convey to the company or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court and a decree ordering conveyances by the defendants of the land to the corporation.

It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as receiver covered all the lands of the corporation, and would cover these lands if the title of the corporation in them was established.

Answers were filed, and evidence taken. Upon the hearing, the Circuit Court was of opinion that the aforesaid conveyances were made by the grantors and received by the defendants as contributions to the railroad company to aid in the construction of the road. The Court was also of opinion that the company could only receive and hold lands for the necessary purposes of the road. The decision was, that plaintiff was entitled to recover the title and possession of all such lands as are required by the company for necessary railroad purposes (such as right of way, depots, &c.); and that the bill, as to all other portions of the land described therein, should be dismissed.

*Walter C. Larned* and *Herbert M. Turner*, for appellant.

*George H. Noyes*, for Hiles, appellee.

MILLER, J. [After holding that the company had no authority to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purposes than those mentioned in the act of incorporation]

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *National Bank v. Matthews*, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in

behalf of the company in violating the law and enabling the company to do that which the law forbids.

We are urged to consider that if this decree is affirmed dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is

*Affirmed.*

MR. CHIEF JUSTICE FULLER did not hear this case and took no part in its decision.

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## SECTION VI.

*Ultra Vires Contract remaining wholly executory on both Sides, or Executed only in Part by either Side. Action for Breach, or for Cancellation.*

NASSAU BANK v. JONES ET AL. EX'RS.

1884. 95 *New York*, 115.<sup>1</sup>

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1883, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 17 J. & S. 498.)

This action was brought against defendants as executors of the will of Daniel Jones to compel them to transfer and deliver to plaintiff fifty \$1,000 bonds and one hundred and twenty-five shares of the stock of the Denver and Rio Grande Railroad Company, or to account for and pay over the value thereof and all interest and dividends received by their testator thereon.

The material facts are stated in the opinion.

~~Hand~~ *Hand*, for appellant.

*Martin J. Keogh*, for respondent.

<sup>1</sup> Arguments and part of opinion omitted. — ED

RUGER, Ch. J. The question involved in this case, as we regard it, is the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad corporation.

In the spring of 1879, the Denver and Rio Grande Railroad Company, being a corporation organized to construct railroads in Colorado and adjoining territories, with the view of raising money to extend its lines, published a circular, whereby it proposed in substance, to issue \$5,000,000, of its bonds, in sums of \$1,000 each, payable thirty years after date, with annual interest at seven per cent in gold, secured by mortgage upon its property; and to deliver one of such bonds together with five shares of its capital stock, of the par value of \$100, per share, to each and every person who should advance thereon the sum of \$900, reserving, however, the privilege to the railroad company, of withdrawing the proposition, when it should have received subscriptions to said loan, to the amount of \$3,000,000. This proposal was favorably received, and the loan was subscribed for by citizens and corporations in various States of the union, to an amount greatly exceeding the sum required by the railroad company. Among others the defendants' testator, one David Jones, subscribed for, and was awarded \$90,000, of such contemplated loan. It is claimed by the appellant, and was found as a fact by the trial court, that Jones undertook, by the authority and for the benefit of the plaintiff, to contract with this railroad company, for a loan, under its proposal, in the name of the plaintiff, to the extent of one-half of the amount which should be allotted to him; and by this action the appellant seeks to recover, from Jones' executors, among other things, the profits claimed to have been made by him upon its share of the transaction. The right to maintain the action seems to depend upon the power of the bank to enter into the proposed contract, for if it had no lawful authority to make such a contract it could not become liable to Jones upon its obligation to take and pay for the property contracted for; and consequently there would be no consideration for Jones' undertaking to subscribe for the benefit of the bank. Not only this, but the bank could not, by suit, enforce against any one an executory contract which it was unauthorized by its charter to make.

It becomes necessary, therefore, to inquire into the nature of the proposed contract, and the legal capacity of the plaintiff to transact business.

[After discussing these questions, the opinion proceeds as follows:]

For these reasons, we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any engagement as a stockholder in a railroad corporation.

The contract between the plaintiff and Jones was wholly executory, and nothing has occurred thereunder, preventing the bank from setting up its own want of authority to make such a contract, as a defense to any action brought thereon by Jones.

While executed contracts, made by corporations in excess of their legal powers, have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defense to actions brought by corporations, their want of power to enter into such contracts (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Woodruff v. E. R. Co.* 93 id. 618), this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations. It was said by Judge SELDEN, in *Tracy v. Talmage* (14 N. Y. 179), "That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny." In *White v. Buss* (3 Cushing, 448), Chief-Justice SHAW lays down the rule as follows: "It is well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action.

Lord MANSFIELD, in *Smith v. Bromley* (Douglas, 696), says: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action." In *Tracy v. Talmage*, (*supra*, 217), Judge COMSTOCK says: "It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced."

There is nothing in this case to exempt the plaintiff from the operation of the general principle determined in the cases referred to.

Jones owed no duty to the plaintiff, except that which sprang out of his engagement to purchase the stock and bonds in question; and that having failed on account of its illegality, left no enforceable obligation resting upon him. (*Levy v. Brush*, 45 N. Y. 589.) There is no pretext for the claim that the contract was in any respect an executed one, for Jones never even entered upon its performance. His subscription for the loan in his own name was in direct violation of the obligation which it is claimed that he had assumed; and it is that obligation alone which is sought to be enforced in this action. The bank, by the transaction in question, secured Jones' promise to do certain things, and has relied solely upon that promise. It has done nothing in performance of the contract, and, so far as it is concerned, the contract remains wholly executory.

Neither can Jones be treated as a trustee for the benefit of the plaintiff, a trust whereby it is attempted to accomplish an illegal purpose, is quite as objectionable as a direct contract to effect the same object.

The law does not raise an implied obligation to effectuate a purpose which is forbidden, and which cannot be effected by the parties through the agency of an express contract. (*Perry on Trusts*, § 214.)

The claim here is that a trust should be implied to enable the plaintiff to reap the profits from a transaction in which it was not authorized by law to engage. We have found no authority which supports such a

claim and are unable to discover any ground upon which this action can be maintained.

It follows that the judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

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### JEMISON v. CITIZENS' SAVINGS BANK.

1890. 122 *New York*, 135.<sup>1</sup>

APPEAL from General Term of Supreme Court in First Judicial Department, affirming a judgment in favor of defendant.

*Francis C. Barlow*, for appellant.

*Benjamin H. Bristow*, and *William D. Guthrie*, for respondent.

HAIGHT, J. The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York. The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that in the transaction alleged in the complaint it acted as the agent of one Albert P. Clopton, of Jefferson, Texas, and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to.

Whilst the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good responsible customers," the General Term was of the opinion that this defense could not be sustained for the reason that the defendant did not disclose the name of its principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal and not the defendant, his agent, would have been liable. Without stopping to consider the evidence we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered, giving the amount, and this was followed by an order by telegraph from Parsons, as cashier,

<sup>1</sup> Arguments and part of opinion omitted. — Ed.



under date of February tenth, to buy 100 bales, June delivery, and on the same day he wrote the plaintiffs that the order was made for one of their customers who had deposited \$250, as per their favor of the twenty-seventh ult. Other orders followed, the final result of which was a loss, to recover which this action was brought. At the time Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution and by-laws, having the general charge of the business of the bank and the supervision of the concern, and inasmuch as the answer alleges that the transactions referred to in the complaint were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. This brings us to the question whether or not the defendant had the power to make the orders in question.

Whilst the buying and selling of cotton to be delivered in the future, may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the state, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs and that the defendant is estopped from setting up the defense. In the case of *Whitney Arms Co. v. Barlow* (63 N. Y. 62) the plaintiff was a corporation organized for the purpose of manufacturing every variety of fire-arms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in *Parish v. Wheeler* (22 N. Y. 494), in which it was held that a railroad company having purchased and received a steamboat could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. (*Nassau Bank v. Jones, supra*; *P. C. & S. L. R. Co. v. K. & H. B. Co.* 131 U. S. 371-389.)

In the case at bar, the transaction as we have seen was not only im-

moral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York in which the members doing business therein with other members act as principals and are liable as such. The most that can be claimed is that they held the cotton or the contracts therefor subject to the call or order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that under the circumstances of this case the defense of *ultra vires* is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is, therefore, liable as such. If the defendant had no power to engage in the business as principal we do not understand what right it had to do so as an agent, but conceding that it was an agent and that the orders were made for and on behalf of Clopton then this action should have been brought against Clopton instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders and for that reason it is liable; but if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal and liable as such, and if a principal then the question of *ultra vires* arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of *ultra vires*, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent and still bind himself as a principal, but if he is proceeded against as a principal he is entitled to all of the rights and privileges that the law gives to a person occupying that position.

We consequently are of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

## MCCUTCHEON v. MERZ CAPSULE CO.

1896. 37 *U. S. Appeals*, 586.<sup>1</sup>

IN the U. S. Court of Appeals, Sixth Circuit. Before TART and LURTON, Circuit Judges, and HAMMOND, District Judge.

Appeal from U. S. Circuit Court for Eastern District of Michigan.

Bill in equity by Merz Capsule Co. (a Michigan corporation), against the U. S. Capsule Co., R. H. McCutcheon, its president, and various other parties. Cross bill by U. S. Capsule Co. against Merz Capsule Co. Evidence was taken and both causes were heard.

Two corporations (the Merz Capsule Co. and the National Capsule Co.) and two partnerships, severally engaged in the manufacture and sale of hard, empty gelatine capsules, entered into an agreement, dated Nov. 29, 1893, for the combination and consolidation of their several properties and business interests. They agreed to organize a new corporation for carrying on said business; the stock to be divided among the above parties. They agreed to convey their respective plants, machinery, &c. to the new corporation; the value of the real estate to be determined by appraisers if necessary. In payment for these conveyances each party was to receive from the new corporation mortgage bonds to the amount of the appraised value of the property thus conveyed; the mortgage to cover all the property of every kind belonging to the new corporation. It was also agreed that none of the above parties should hereafter engage in the manufacture or sale of empty gelatine capsules.

In pursuance of the above scheme, the parties organized a new corporation under the general law of New Jersey, called the United States Capsule Co. The capital stock of this new company was allotted to the above parties. The property owned and operated by each of the parties in making and selling hard, empty gelatine capsules was valued by appraisers, as provided in the agreement, and conveyances and bills of sale executed to the United States Capsule Company. The instrument of sale executed by the appellee, the Merz Capsule Company, bears date December 21, 1893, and recites a "consideration of \$15,000, and other good and valuable consideration." In point of fact this part of the transaction is yet incomplete. No mortgage has been made by the United States Capsule Company, and no bonds have been executed for the appraised value of this property as contemplated by the agreement, though the United States Capsule Company did give to the Merz Capsule Company a certificate, reciting that the latter company was to receive bonds to the amount of the appraised value of its property when the mortgage should be made and the bonds executed.

On the same day that the above-mentioned deed was made and

<sup>1</sup> Statement abridged. Part of opinion omitted. — Ed.

delivered the Merz Capsule Company accepted a lease upon its premises, machinery, plant, etc., in consideration of a nominal rent, the lease to terminate on January 15, 1894, and thereafter continued in the use and occupation of its property, operating the plant for the purpose of working up stock on hand not included in the sale. While thus remaining in the actual possession of its premises and manufacturing plant, the Merz Capsule Company determined to withdraw from its engagements and contracts with the other parties to the agreement, being advised, as the original bill alleges, that the contract then entered upon, and the conveyance in furtherance thereof, were unlawful and in excess of its corporate powers. The motive which led to this repudiation is not of great importance, though the evidence seems to make it pretty clear that disappointment in obtaining the control of the new business led to serious doubt as to the validity of the arrangement. This determination was notified to the officers and directors of the new corporation, the stock certificates were tendered back and a complete rescission was demanded. This tender was refused and rescission denied. Having also given public notice of the invalidity of the instrument under which the United States Capsule Company asserted title and right of possession to its manufacturing plant, the Merz Capsule Company resumed its ordinary course of business as an independent manufacturing corporation.

On January 22, 1894, while thus in the full and peaceable possession of its premises and the use of its machinery and appliances, the defendants are shown to have made an entry upon those premises through the officers, agents and servants of the United States Capsule Company, under circumstances of considerable aggravation, for the purpose of removing the machinery and stock of the said Merz Capsule Company, and did actually tear down a part of such machinery and remove a part thereof from the premises, and were only prevented from completely dismantling the factory by an exertion of force.

Thereupon the Merz Capsule Co. filed its original bill against the U. S. Capsule Co., McCutcheon, *et als.*; alleging in effect that the aforesaid agreement was illegal and in excess of corporate powers; that defendants, for the purpose of compelling plaintiffs to carry out the scheme, threatened further trespasses, for which the plaintiffs' remedy in damages would be inadequate; and praying that the above agreements and conveyances should be cancelled, and defendants enjoined from interfering with the possession of plaintiffs' property and premises.

The U. S. Capsule Co. answered and filed a cross bill, setting up the said agreements and conveyances as legal instruments, and praying for their specific performance.

Upon full proof the U. S. Circuit Court made a decree, restraining the U. S. Capsule Co. from the commission of further trespass, declaring the several agreements *ultra vires* and illegal under the law of Michigan, and decreeing that the title to the disputed property is

quieted in the Merz Capsule Co. The cross bill of the U. S. Capsule Co. was dismissed.

The U. S. Capsule Co. *et als.* appealed.

*Henry M. Campbell* (*Russel & Campbell* were on the brief), for appellants.

*Edwin F. Conely*, for appellee.

LURTON, J. [The Court *held*, "that the agreement of Nov. 29, 1893, as to the Merz Capsule Company, and the subsequent conveyance and bill of sale to the United States Capsule Company made in furtherance of that agreement, are inoperative, null and void, as in excess of its corporate powers." "Being *ultra vires*, the consent of its stockholders cannot legalize or vitalize the transaction." The opinion then proceeds as follows : ]

The final objection urged by the appellants is that, if the agreement between the Merz Capsule Company and its associates is subject to the objection that it was unauthorized by its organic law and contrary to the public policy of Michigan, the objection cannot be urged by that corporation as a ground for affirmative relief in a court of equity. Undoubtedly, if the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, and has not been repudiated by the defendant, neither a court of law nor of equity will lend its active assistance to the recovery of property or money paid on such a contract, or aid in bringing about its surrender or cancellation. The doctrine of the courts applicable was stated very aptly by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company v. Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393, 407, when he said : "The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis* ; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355 ; *Spring Co. v. Knowlton*, 103 U. S. 49 ; Story Eq. Jur. § 298. While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law ; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose."

But this rule, by which the defense of *particeps criminis* is sanctioned by courts, as stated by Lord Truro in *Benyon v. Nettlefold*, 3 Macn. & Gord. 94, 101, and approved by Lord Selborne in *Ayerst v. Jenkins*, is rested "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." But in the case last cited Lord Selborne notices a very obvious limitation, by saying : "When the immediate and direct effect of an estoppel in

equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy." L. R. 16 Eq. 275, 283.

The contract in the case at bar between the parties *in pari delicto* is in a large degree still executory. Though a deed and bill of sale have been executed and delivered in furtherance of the original agreement, possession has not been surrendered, and the bonds to be delivered in payment have neither been delivered nor executed. The conveyee under the deed has indeed applied to this court, through its cross bill, for the specific performance of the agreement by being placed in possession under the deed, and for an accounting with the appellee. There is an obvious distinction between the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The cases stating this distinction are referred to and commented upon by Lord Cottenham, in *Simpson v. Lord Howden*, 3 Myl. & Cr. 97 *et seq.*, by Lord Selborne, in *Ayerst v. Jenkins*, L. R. 16 Eq. 275, and by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company v. Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393.

In *Whaley v. Norton*, 1 Vernon, 482, 483, the Master of the Rolls said "that there would be a difference in these cases between a contract executed and executory, and that this court would extend relief as to things executory, which if done, it may be might stand." The case of *Spring Company v. Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted and he is desirous of rescinding it, provided the contract was not one *malum in se*.

The specific performance sought under the cross bill has rendered necessary the expression of a definite opinion as to the validity of the contract thus set up by the United States Capsule Company. In view of this opinion, necessitating an affirmance of the decree, as far as it dismissed the cross bill, ought we to stop at this point and decline to grant any part of the relief sought by the appellee? The Merz Capsule Company does not seek to recover back either property or money paid or delivered under its agreement or deed. Before actually surrendering possession of its premises, machinery and appliances, or transferring its patents and processes, it repudiated the whole scheme and tendered back all that it had ever received, and has kept that tender good. But it has neither lost possession nor received the bond payment it was entitled to receive. Having given notice of its purpose to go no further in an illegal scheme, it remained in the peaceable possession of its property and in the ordinary conduct of its business. Without resorting to legal proceedings, the United States Capsule Company sought to obtain possession of the property of the recalcitrant grantor, and, when pre-

vented by force from accomplishing its unlawful object, avowed its purpose by a repetition of the trespass to obtain a possession which it could not secure by a resort to legal procedure. The effect of a continuance of these unlawful methods to obtain possession, as shown by the pleadings and proof, would be most injurious to the business of the complainant, and the remedy at law inadequate. Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.

The decree of the court declaring the illegality of the agreement of November 29, 1893, and of the deed of December 21, 1893, and restraining the appellants from interfering with the title or possession of the appellee under color thereof, should be, and accordingly is,

*Affirmed.*

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## SECTION VII.

*Suit by Corporation on an Ultra Vires Contract which has been fully performed on its Part.*

BOND v. TERRELL C. & W. MANUF. CO.

1891. 82 Texas, 309.<sup>1</sup>

TARLTON, JUDGE, *Section B.* This suit was brought November 9, 1889, by appellee against J. R. Bond and others, in the District Court of Kaufman County, to recover a balance due of \$875 on a promissory note executed January 23, 1888, by appellants (J. R. Bond as principal and the others as sureties) in favor of appellee, and due twelve months from date.

Defendants answered, that the note was executed in consideration of money loaned by plaintiff to the principal Bond; that plaintiff at the time it made the loan was a private corporation under the laws of Texas, and was by its charter authorized and empowered to manufacture and vend cotton and woollen goods, and do other acts incident and necessary thereto; that under its charter plaintiff had no authority to loan money; that for more than seven years before the institution of

<sup>1</sup> Arguments and part of opinion omitted. — ED.

the suit plaintiff had not engaged in the manufacture and sale of cotton and woollen goods, but had confined its operations to loaning money; that the note was void.

[The case was tried by the court without a jury. Judgment was rendered in favor of the Terrell Co. for the full amount sued for. The defendants, Bond *et als.*, appealed. The trial court made various special findings of fact.

From these facts that court concluded, as matter of law, as follows :

1. The plaintiff, under its charter, had no power or right to loan defendants its funds or capital.

2. Defendants having received the money for which the note was executed by them, are estopped from denying the power of plaintiff to loan the money.

The opinion of TARLTON, J., after giving the history of the case, proceeds as follows :]

The last finding of the court is assigned as error, and presents the only question to be considered by us, viz. : Are the appellants, who have received the money in consideration of which they executed the note sued on, in a position to question the appellee's right of recovery?

In considering the question, it will be conceded that the court was correct in finding that the act of the plaintiff corporation in loaning the money was *ultra vires*.

It seems now to be settled by the great weight of authority, that where there is a question of a contract between a corporation and another party, and the contract has been performed by the other party, and the corporation has received the benefit of the contract, it will not be permitted to plead that on entering into the contract it exceeded its chartered powers. *Railway v. Gentry*, 69 Texas, 632, and the numerous authorities there cited. This rule operates conversely. If the other party has received from a corporation the benefit of a contract fully performed in good faith by it, he will not be heard to resist enforcement of the contract as to him by pleading the mere want of power in the corporation to enter into the contract. *Arms Co. v. Barlow*, 63 N. Y. 70; *Darst v. Gale*, 83 Ill., 136; *Bradley v. Ballard*, 55 Ill., 417; *Cozart v. Railway*, 54 Ga., 379; *Tel. Co. v. Railway*, 1 Fed. Rep., 745; *Dimpfel v. Ohio, etc., Co.*, 8 Fed. Rep., 646; *Hitchcock v. Galveston*, 96 U. S., 341; *Natchez v. Mallory*, 54 Miss., 497; *Thompson v. Lambert*, 44 Iowa, 239; *Railway v. Alleghany Co.*, 79 Pa. St., 210, 215; *Watts' Appeal*, 78 Pa. St., 370, 392; *De Graff v. Am., etc., Co.*, 21 N. Y., 124; *Gallion v. Hays*, 29 Ohio St., 330, 340; *Railway v. McCarthy*, 96 U. S., 258, 267; *Bliss v. Loan Co.*, 30 N. W. Rep. 465. This rule is supported by the more modern decisions, and seems to us to be founded in the suggestions of fair dealing and honesty. It does not appear, though the loaning of the money by the corporation to the appellant Bond was *ultra vires*, that his rights were in any way infringed by the transaction. Why, then, should he be heard to complain? If he should return the money



which he received, he would be doing but an act of justice in restoring it to the stockholders of the corporation to whom it legitimately belongs. Meanwhile, if on account of the public welfare he feels solicitous that the corporation should be prevented from engaging in future loaning operations in excess of the power conferred by the statute under which it is organized, the remedy against such a usurpation can at any time be invoked by him. He could easily become the relator in a *quo warranto* proceeding to be instituted under Article 4089 i. of the Revised Statutes.

We have found but one series of modern decisions militating against the views here expressed. We refer to the decisions of the Supreme Court of Alabama. In that State it is held that a person who has made a contract with a corporation which is *ultra vires* is not estopped from pleading the invalidity of the contract, though he has received the benefit of it. *City Council v. Montgomery, etc., Co.*, 31 Ala., 76-88; *Chambers v. Falkner*, 65 Ala., 448; *Bank v. Duncan*, 54 Ala. 471. As expressed in the case first cited, the objection to the application of the doctrine of estoppel in the connection stated is, that "if it be established these corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations will have the effect of conferring powers on them which the Legislature has withheld." We can not appreciate the force of this reasoning, as applicable to the jurisprudence of our own State. As above indicated, the remedy by *quo warranto* exists to prevent such abuse of the corporate powers. A usurping corporation acts always under the menace of forfeiture and dissolution.

Appellants, however, contend that the doctrine of estoppel should not apply in this case, because the corporation is forbidden to use its funds for the purpose of loans by the statute under which it is organized; that in this case the act of the corporation was not merely without authority, but that it was in violation of law. The statute referred to is article 589, Revised Statutes, which reads as follows: "No corporation created under the provisions of this title shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." It is true that a distinction is made between the act of a corporation which is merely without authority and one which is illegal. In the one case, it is a question of authority; in the other, of legality. A corporate act becomes illegal when committed in violation of an express statute on a specific subject, or when it is *malum in se* or *malum prohibitum*, or when it is against public policy. Beach on Priv. Corp., sec. 438; Taylor on Priv. Corp., secs. 293-295. If, therefore, the transaction here engaged in by appellee was not merely beyond its powers but was also illegal, in the sense stated, the contention of appellants should prevail.

It will be noted that article 589, relied upon by appellants, is a gen-

eral statute. It is merely declaratory of the common law, by which corporations are strictly confined in their powers to the limits and fixed purposes for which they were created. The language of the statute at most emphasizes the doctrine of the common law. To such "general prohibitions, against the doing by corporations of acts beyond the scope of the corporate powers, courts appear to give little effect." Taylor on Corp., sec. 295 ; *Curtis v. Leavitt*, 15 N. Y., 54 ; *Halstead v. Mayor*, 3 N. Y., 430-433. And in many cases (and these in our opinion the most authoritative) where the statute has a specific but at the same time an implied application, the doctrine of estoppel against the beneficiary of an executed contract is not changed. Thus, in the case of *National Bank v. Mathews*, 98 United States, 621, it was held by the Supreme Court of the United States that a national bank could enforce against a mortgagor a mortgage on real estate executed to it as collateral security for future indebtedness ; and this though the transaction was a loan on real estate, and though by a statutory provision regulating its powers (Rev. Stats. U. S., sec. 5137) it was by clear implication forbidden to loan money on real estate. The sovereign power alone can complain of the transaction. "We can not," is the language of the court, "believe it was meant that stockholders and perhaps depositors and their creditors should be punished and the borrower rewarded by giving success to this defence whenever the offensive fact shall occur. The impending danger of judgment of ouster and dissolution was, we think, the check, and no other, contemplated by Congress." It appears to be the settled rule and doctrine of our highest tribunal that the benefited party to a contract executed by a corporation shall be held estopped from resisting the demand of a corporation founded upon such contract, even though by the statutory charter of the corporation it is by clear implication forbidden to enter into the contract. *Bank v. Whitney*, 103 U. S., 99 ; *Swope v. Lef-fingwell*, 105 U. S., 3 ; *Reynolds v. Bank*, 112 U. S., 405.

We therefore agree with the court below, that the appellants, having received the benefit of the loan are in no position to question its validity, and we conclude that the judgment should be affirmed.

*Affirmed.*

## MARBLE CO. v. HARVEY.

1892. 92 *Tennessee*, 116.<sup>1</sup>

APPEAL from Chancery Court of Knox County. H. R. GIBSON, Ch. *Green & Shields* for Marble Company.

*W. C. Kain* for Harvey.

LURTON, J. The complainant is an Ohio corporation, and was organized under the general incorporation law of that State "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issue of shares made by a Tennessee incorporation, engaged in a similar business and under a similar charter, and known as the "McMillin Marble Company." Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned, at the time of the sale, twenty-five shares, being one half of the entire stock of the company. These shares he conveyed to a trustee, selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of six thousand dollars, the defendant assuming and agreeing to personally pay off and discharge one half of all liability which might be fixed upon the McMillin Marble Company as a result of certain suits against that company then pending in the Courts of this State.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Company, to pay out about the sum of three thousand dollars in settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one-half this sum, being the proportion he agreed to pay under his agreement of sale.

The defense is that the contract of sale to the complainant company was unlawful and void; that is to say, that the purchase of these shares was outside the objects of its creation as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or hold the shares of another corporation; that the suit is one upon a void contract and in furtherance of it, and that it should not be entertained by a Court of law or equity.

[After discussing the question of *ultra vires* the opinion proceeds as follows:]

The result is, that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and,

<sup>1</sup> Part of opinion omitted. — Ed.

therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the Courts of the State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant, that where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the Court, in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co. v. Barlow*, 63 N. Y., 62, is one of this class.

So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the *mode* of executing the contract or in the *power of the agent*.

So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefits received. Green's Brice's *Ultra Vires*, 717, and note at end of chapter.

Again, there are cases where the Courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the Courts have held that the defect in power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of *Barrow v. Turnpike Co.*, 9 Hum., 303, and *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668.

The question here is not like any of these. The complainant sues upon its contract, and, in affirmance of it, seeks to have the defendant perform an agreement which sprang from, and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Company. The suit is clearly in furtherance of the original, unlawful, and void contract. /That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it. |

This proposition was very plainly put in *Pittsburg, etc., v. R. & H. Bridge Co.*, where it was stated, as a result of all the previous decisions of that Court upon this subject, "that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S., 389.

The case of *Central Transportation Co. v. Pullman Car Co.* [139 U. S. 24] is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff.

In that case, the Central Transportation Company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the Court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing its own decisions upon this branch of the case, that Court said :

“ The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows : A contract of a corporation which is *ultra vires* in the proper sense — that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature — is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But where the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by law.

“ A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain

any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." 139 U. S., 60.

This seems to us to fully and clearly state the rule. The passage cited by counsel from *Railway Co. v. McCarthy*, 96 U. S., 267, "that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong," is misleading; and, if literally construed, would result in an enormous practical extension of the powers of corporations.

We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned Judge doubtless intended it to be understood that the defense would be a legal wrong only when the law did not require its consideration by the Court.

This passage and one of similar character in *San Antonio v. Mehaffy*, 96 U. S., 312, was uncalled for in the case in which it was used, and in *Central Transportation Co. v. Pullman Car Co.*, *supra*, was characterized as "a mere passing remark."

To sustain this suit, as now presented, would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

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WALTON, J. IN BRUNSWICK, &C. CO. v. UNITED, &C. CO.

1893. 85 *Maine*, p. 541.

BUT it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the

works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray, in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. *Pittsburgh, etc. v. Keokuk, etc.*, 131 U. S. 371. We think this the correct rule. 2 Beach on Corp. s. 423, and cases there cited.

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WASHBURN MILL CO. v. BARTLETT.

1893. 3 North Dakota, 138.<sup>1</sup> 446/46

*J. E. Bishop*, (*Akers & Lancaster* of Counsel), for appellant.

*Thorp and Ellsworth*, (*Ball & Watson* of Counsel), for respondent.

BARTHOLOMEW, J. The appellant herein, the Washburn Mill Company, is a corporation chartered by the State of Minnesota, and organized and existing under and by virtue of her laws. It brought this action in the District Court for Sargent County, in this state, to foreclose a real estate mortgage executed by S. J. Bartlett and F. G. Bartlett, the respondents herein, to secure a promissory note given by respondents to appellant. The answer admits the execution of the note and mortgage, and as a sole defense thereto alleges, in substance, that at the time the same were given, appellant was a foreign corporation, and was engaged in and carrying on the regular business of dealing in lumber at Forman, and other points in the Territory of Dakota, (now State of North Dakota;) and that said note and mortgage were given and received at said Forman, and in the regular course of appellant's business; and then proceeds to set forth certain facts to show that at the time of said transactions appellant had not complied with the statutory provisions then in force in the Territory of Dakota, and now in force in this state, relative to the transaction of business by

<sup>1</sup> Statement and arguments omitted. — ED.

foreign corporations. There was a demurrer to the answer, which the trial court overruled, and this ruling is the only question involved in this appeal. The statutes relied upon constitute §§ 3190, 3192 of our Comp. Laws, and read as follows: "No corporation created or organized under the laws of any other state or territory shall transact any business within this territory, or acquire, hold, and dispose property, real, personal, or mixed, within this territory, until such corporation shall have filed in the office of the secretary of the territory a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this article: provided, that the provisions of this act shall not apply to corporations or associations created for religious or charitable purposes only." Section 3192: "Such corporation shall appoint an agent, who shall reside at some accessible point in this territory, in the county where the principal business of said corporation shall be carried on, duly authorized to accept service of process, and upon whom service of process may be made in any action in which said corporation may be a party; and service upon such agent shall be taken and held as due service upon such corporation. A duly authenticated copy of the appointment or commission of such agent shall be filed and recorded in the offices of the secretary of the territory and register of deeds of the county where said agent resides, and a certified copy thereof by the secretary or register of deeds shall be conclusive evidence of the appointment and authority of such agent." Three errors are assigned and argued: *First*, the answer does not state facts sufficient to show noncompliance with said statutes: *Second*, said statutes do not make contracts made in violation of the provisions thereof void or unenforceable as between the parties thereto, or in any way affect their rights or remedies. *Third*, said statutes, as applied to the case at bar, are unconstitutional, in that they interfere with interstate commerce.

As to the first point, without setting forth the allegations in detail, we have to say that a careful consideration of them leaves no doubt in our minds that the allegations fairly show noncompliance with the statute, and the trial court committed no error in so holding.

The second point is difficult, and involved in much confusion. While these provisions have been upon our statute books for years, appearing as §§ 567, 569 in the Civil Code of 1877, yet they are now, for the first time, to be passed upon by the court of last resort in this jurisdiction. On three different occasions (*Machine Co. v. Moore*, 8 N. W. Rep. 131, 2 Dak. 280; *Manufacturing Co. v. Foster*, (Dak.) 30 N. W. Rep. 166; and *Lumber Co. v. Keefe*, 41 N. W. Rep. 743, 6 Dak. 160) an effort was made to raise the point before the Supreme Court of Dakota Territory, but no ruling was ever made. In declaring the effect of statutes prohibitory in form, courts have but one object in view, — the real purpose of the statute; the real intention of the legislature in its enactment. It may be stated as a rule at common law that if a statute forbids an act to be done — provides a penalty for doing



it — any contract to do the forbidden act is void, whether the statute expressly so declares or not. *Machine Co. v. Caldwell*, 54 Ind. 276. And when the purpose of the enactment is the absolute prohibition of a certain act, then the performance thereof is invalid, whether the prohibited act be *malum in se* or simply *malum prohibitum*. *Holt v. Green*, 73 Pa. St. 198; *Pratt v. Short*, 79 N. Y. 437. But in determining the purpose of the enactment, courts consider the nature of the forbidden act, for the very obvious reason that when such act is immoral or criminal in its nature, or dangerous to life, health or property, the presumption must prevail that legislative wisdom intended to stamp it out; while if the act be innocent in itself and in its consequences, no such presumption necessarily arises. Among the former may be mentioned gaming contracts, contracts for the sale of intoxicating liquors, where such sales are made criminal, contracts for the sale of diseased food, champertous contracts, etc. A large number of the cases arose under statutes of this kind, and are not authority for the case at bar. To properly construe statutes of the nature of the one here involved, it is necessary to first consider the powers and privileges of foreign corporations in the absence of all statutory regulations. While it is undoubtedly true, as stated by Chief Justice Taney in *Bank v. Earle*, 13 Pet. 588, that “a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created,” and that “every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied,” yet this implied sanction is always presumed to exist until the contrary appears. In the same case it is said: “We think it well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts, and that the same law of comity prevails among the several sovereignties of this Union.” In *Elston v. Piggott*, 94 Ind. 17, it is said: “This principle of the comity of nations is a part of the common law, and is by long settled rules, as well as by positive statute, ingrafted on our law.” And to same effect are *Christian Union v. Young*, 101 U. S. 352; *Thompson v. Waters*, 25 Mich. 214; *Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. Rep. 37; Ang. & A. Corp. §§ 372, 376. Of course this comity only extends to the exercise of such powers as are expressly granted in the charter conferred by the creating sovereignty. It is true, also, that one sovereignty has the power to exclude from its territory any corporation created by another sovereignty; but this must be done by express statute, or by the settled policy of the state, as evinced by the decisions of its courts of last resort. And this includes the lesser right to prescribe terms with which such foreign corporation must comply. We have no statute excluding foreign corporations, except as heretofore quoted, nor has it ever been the policy of this state to exclude foreign corporate capital

and business enterprise. Appellant, unless forbidden by the statute quoted, had the power to transact business and enter into contracts in the Territory of Dakota. The nature of its contracts contravened no policy of that territory. The contract was innocent in itself and in its consequences. Under these facts, was it the legislative purpose, by the enactment of §§ 3190, 3192, Comp. Laws, to declare contracts of this character, entered into before the foreign corporation had complied with the provisions of said sections, unenforceable and void? Similar statutes upon this and other subjects are found in all the states of this Union, and in their construction so much is left to judicial determination that uniformity in the decisions would hardly be expected. The statutes, too, present great variety. Some, like ours, are prohibitory in form, with no penalty attached, and silent as to the consequences of noncompliance. Others, while not prohibitory in form, attach a penalty for doing or failing to do certain specified things. Others have both the prohibitory form and the penalty. Some declare contracts made without compliance with their provisions void and unenforceable or unlawful. Others specify various consequences that shall follow noncompliance. One class of cases, where the statutes are prohibitory, with penalty attached, holds that contracts made without compliance with the terms of the statute are nevertheless valid and enforceable, on the ground that by annexing a penalty the legislature manifested its purpose that the penalty should be exclusive of all other consequences of noncompliance. Of this class are *Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. Rep. 37; *Insurance Co. v. Walsh*, 18 Mo. 229; *Insurance Co. v. McMillen*, 24 Ohio St. 67; *Harris v. Runnels*, 12 How. 79. Another class of cases, under similar statutes, holds that the annexation of a penalty renders all acts which subject the party to the penalty unlawful, and hence unenforceable, on the universally accepted proposition that no cause of action can be based upon an unlawful transaction. See *Buxton v. Hamblen*, 32 Me. 448; *Miller v. Post*, 1 Allen, 434; *Wheeler v. Russell*, 17 Mass. 257; *Johnson v. Hulings*, 103 Pa. St. 498; *Holt v. Green*, 73 Pa. St. 198; *Dudley v. Collier*, (Ala.) 6 S. Rep. 304; *Insurance Co. v. Harvey*, 11 Wis. 412; *Elkins v. Parkhurst*, 17 Vt. 105. But there is still another class of cases, where the statute annexes a penalty, that holds that contracts made without compliance with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business, but to accomplish some collateral object. In this class we cite *Larned v. Andrews*, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655; *DeMers v. Daniels*, 39 Minn. 158, 39 N. W. Rep. 98; *Strong v. Darling*, 9 Ohio, 201; *Pangborn v. Westlake*, 36 Iowa, 546; *Rahter v. Bank*, 92 Pa. St. 393. It has been held under statutes, prohibitory in form, but without penalty, and silent as to consequences, such as ours heretofore quoted, that all contracts entered into without compliance with the terms of the statute were absolutely void. These cases are based largely upon the thought that, inasmuch as there is no penalty

or forfeiture provided in the statute for a disregard of its terms, there remains no method of its enforcement, other than to declare all contracts made in disregard of the statutory provisions unenforceable. *Bank v. Page*, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. Rep. 329; *in re Comstock*, 3 Sawy. 218; *Hoffman v. Banks*, 41 Ind. 1; *Insurance Co. v. Harrah*, 47 Ind. 236; *Insurance Co. v. Thomas*, 46 Ind. 44; *Assurance Co. v. Rosenthal*, 55 Ill. 85.

Other cases arising, like those last noticed, under statutes prohibitory in form, but without penalty or expressed consequences, have held that contracts entered into without compliance with the terms of the statute were valid, enforceable contracts as between the parties, and that one who had received and retained the benefits of such a contract could not raise the question of noncompliance. *Bank v. Matthews*, 98 U. S. 621, arose under that provision in the national banking law permitting national banks to purchase, hold, and convey real estate for certain specified purposes, and no other. The bank had received real estate security contrary to the terms of the act, and it was sought to declare such security void in the hands of the bank. The court said the prohibition was clearly implied, and as effectual as if it were expressed; but, on full consideration and a review of the authorities, it was held that the purpose of the statute was not to render such contracts void and unenforceable. The court used this language: "The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree that will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor." And as a conclusion the court said: "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." The court also quoted with approval the following language from Sedg. St. Const. 73: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or power conferred by charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity." *Whitney v. Wyman*, 101 U. S. 392, is equally instructive. It arose under a Michigan statute, which prohibited corporations from transacting business until their articles of incorporation were filed in the proper office, but attached no penalty. Certain parties purporting to act for a certain corporation, but before articles of incorporation were filed, ordered certain machinery of plaintiff, which was forwarded and charged to the parties ordering, and not to the corporation. The parties refused to pay, and plaintiff brought action against them, claiming that the cor-

poration for which they purported to act could not transact business by reason of the statutory restriction. A unanimous court, speaking by Justice Swayne, said: "The restriction imposed by the statute is a simple inhibition. It did not declare what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to plaintiff, and he has no right to raise the question of its invalidity;" citing the case of *Bank v. Matthews*, and showing that the court considered the principle involved to be the same. In *Grant v. Coal Co.*, 80 Pa. St. 218, it is said: "Having dealt with the defendant in error as a *de facto* corporation, there is little merit in the defense now taken, that they were not duly incorporated, and had no right to sue for coal which it is admitted they delivered. Nor is there any question raised upon the record as to the right of this company as a foreign corporation to hold real estate or even mining leases in this state. If the commonwealth has any interest in such inquiry, it can be raised by her proper officer. It is a matter with which the plaintiff in error has no concern." Since the decision of this case in the trial court, the Supreme Court of South Dakota, in an elaborate and instructive opinion by Bennett, J., has passed upon the identical statute here in question, which South Dakota, like North Dakota, received at the hands of the late Territory of Dakota. The conclusion reached by that court, after a full review of the authorities, is thus stated: "Aided by the light of these able decisions, endeavored to be reviewed upon both sides of the question raised in the case at bar, we have come to the conclusion that the constitutional provision and legislative enactment in our state, as quoted above, was not designed or intended as a prohibition upon foreign corporations to contract in this state, to the extent to declare such contracts void, but were merely intended to furnish the means by which our citizens could procure personal judgments against foreign corporations who were their debtors. And while the statute did in terms prohibit the transaction of business until its provisions are complied with, yet whatever objection there might be made to a foreign corporation for noncompliance, it being a statute regulating a public policy, this objection could not be urged collaterally by a private person, but it must be done by a direct proceeding instituted by the state. *Wright v. Lee*, (S. D.) 51 N. W. Rep. 706. See also *Mor. Priv. Corp.* § 665; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. Rep. 93; *Fortier v. Bank*, 112 U. S. 439, 5 Sup. Ct. Rep. 234; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213; *Chase's Patent Elevator Co. v. Boston Tow Boat Co.*, 152 Mass. 428, 28 N. E. Rep. 300; *Merrick v. Engine & Governor Co.*, 101 Mass. 384.

The cases which we have cited from the various classes demonstrate, perhaps, the lack of uniformity with more certainty than they point to the correct rule of construction. Yet when studied, the cases are all found seeking one common object,—the legislative purpose. "The intent of the law maker is the law;" the embarrassment is in declaring that intent. This intention may be declared in the act, or it may

be inferred from its provisions in connection with the subject matter and circumstances. *Howell v. Stewart*, 54 Mo. 400; *Machine Co. v. Caldwell*, 54 Ind. 279. In the statute under discussion the legislature specified reasonable terms upon which a foreign corporation could launch its business over the entire state, unquestioned by private interests or sovereign power. Whatever may have been the primary purpose of the legislature, it certainly was not to exclude foreign corporations from the state. Nor is it reasonable to presume that it was the legislative intent to declare all contracts made by foreign corporations without compliance with the statute absolutely void. It were a reflection upon legislative wisdom to presume that consequences so unusually harsh and oppressive were expected to flow from the use of language so mild and uncertain. Our statute is a simple inhibition. It declares no penalty. It does not declare the transaction of business unlawful or contracts void. We may well use the language of Justice Swayne in *Bank v. Matthews*, *supra*: "The statute does not declare such a security void. It is silent upon the subject. If congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of legislative and judicial decision." The statute by its terms places foreign corporations upon an equality with domestic corporations in the matter of the publicity of the purposes of their creation and their powers, and in the matter of convenience and certainty with which process may be served upon them. It is not possible to read the statute without perceiving this to have been the primary purpose of its enactment. These objects are, or may be, highly necessary for the protection and convenience of our citizens dealing with such corporations. The legislature, having specified the duties of the foreign corporation, provided, in Ch. 26 of the Civil Code, the means for their enforcement, and made it the duty of every prosecuting attorney to see that such conditions were fulfilled, or the corporation barred from the exercise of any corporate franchise within this state. This we believe to have been the remedy, and the only remedy, in the mind of the legislature. These respondents dealt with appellant as a corporation. They received and retained its property, and executed their obligation to pay for the same. The corporation has fulfilled its contract, and now respondents, without offering to return the consideration for their note, ask that they be released from the performance of their contract, for no reason other than the failure of appellant to perform a duty that it owed to the state at large, but the nonperformance of which in no manner prejudiced respondents. We are unwilling to ingraft upon a silent statute a consequence so inequitable. Upon both principle and authority, respondents are precluded from raising the question of noncompliance upon the part of appellant with the provisions of said §§ 3190, 3192, Comp. Laws. The facts alleged in the answer did not invalidate the contract, and the demurrer should have been sustained upon that ground.

It will not be necessary nor proper, in view of what we have said upon the second assignment of error, for us to discuss the constitutional question raised by the third assignment.

The District Court is ordered to vacate its order heretofore entered, and enter an order sustaining the demurrer.

Reversed. All concur.

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## SECTION VIII.

*Suit against Corporation on an Ultra Vires Contract which has been fully performed on the Plaintiff's Part.*

### BISSELL *v.* THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANIES.

1860. 22 *New York*, 258.

APPEAL from the Supreme Court. Action against two distinct railroad corporations for a breach of their duty, safely to convey the plaintiff, a passenger upon a train of cars, which they, by a contract between them, had united in running, and by means of the negligence of their agents suffering a collision with another train, by which the plaintiff's leg was broken. The trial was before referees, who found these facts:

The Michigan Southern Railroad Company was chartered by the State of Michigan to build and operate a railroad through the southern part of Michigan; and the Northern Indiana Railroad Company was chartered by the State of Indiana to build and operate a railroad through the northern part of the State of Indiana. The Southern Michigan Railroad Company built the road through the State of Michigan, and the Northern Indiana Railroad Company built the road through the State of Indiana; and also, in conjunction with another railroad company, they built the railroad from the northern part of the State of Indiana, through a part of the State of Illinois, to the city of Chicago. Previous to the 25th day of April, 1853, the Southern Michigan Railroad Company and the Northern Indiana Railroad Company formed a business connection, under the name of the Michigan Southern and Northern Indiana Railroad Companies, and on or about the 25th day of April, 1853, ran their cars carrying passengers and freight from Lake Erie to Chicago and the intermediate places, and from Chicago to Lake Erie and the intermediate places, through the States of Ohio, Michigan, Indiana and Illinois. The cars and other property connected with these roads were used by the Michigan South-

ern and Northern Indiana Railroad Companies jointly, and each shared in the profits and losses. The business of the companies was carried on and transacted under their joint name, and the companies were practically consolidated into one. The defendants, on the 25th day of April, 1853, and at the time this action was brought, had, in the city of New York, in this State, a general office of business, occupied by their president and treasurer, where a large portion of their moneys, funds and other property was kept. On the 25th day of April, 1853, while the defendants were jointly operating these roads, from Chicago to Lake Erie, through the States of Illinois, Indiana, Michigan and Ohio, to Lake Erie, the defendants took into a train of their cars near Chicago, in the State of Illinois, the plaintiff and his baggage, as a passenger therein, to Toledo, for fare and reward. While the plaintiff was on the defendants' cars, and while being conveyed by them eastward on said road, in the State of Illinois, the defendants' cars were run carelessly, at a hazardous speed at the crossing of the Illinois Central Railroad, and the road occupied and run by the defendants; by means whereof the defendants' cars run into and came in collision with a train of cars then running on the Illinois Central Railroad, across the said road owned and occupied by the defendants, and a passenger car of the defendants', which the plaintiff occupied, was broken to pieces, and the plaintiff damaged and injured in his person and property.

The referees reported in the plaintiff's favor for \$2,500, for which judgment was entered; and such judgment having been affirmed at general term in the sixth district, the defendants appealed to this court.

*Charles Tracy*, for the appellants.

*Anasa J. Parker*, for the respondent.

COMSTOCK, Ch. J. A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the State of Illinois, and through the States of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement which had been in force between the defendants for some time previous to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger from Chicago, or a point near that place, eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that during the transit he was injured by an accident which happened through their carelessness and neglect. Assuming the truth of this statement, there is no doubt of the plaintiff's right to recover. But the defendants deny the legal truth of these facts, because one of the companies was chartered by the legislature of Michigan, with power to build a road in that State, and the other by the legislature of Indiana, with power to build one in that State. They both insist that they had no right or power under their respective charters to consolidate their

business in the manner stated, and especially that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract in the customary fare which he paid. Their defence is, simply and purely, that they transcended their own powers and violated their own organic laws. On this ground they insist that their business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois; that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can then two railroad corporations, having connecting lines, thus unite their business, for the purpose of promoting their common interest: charter another connecting road in furtherance of the same policy: hold themselves out to the public as carriers over the whole route: enter into contracts accordingly: receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defence is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think it has no foundation in the law.

The doctrine has certainly been asserted on some occasions, that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest, denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain faculties given to them by law, which faculties are limited to the precise purposes and objects of their creation, and can no more be exerted outside of those purposes and objects than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view, these artificial existences are cast in so perfect a mould that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of



these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them: in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts, is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons.

I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton, and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value; while the injured dealer must seek his remedy against agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain, without incurring the hazards of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. The proceeds of unauthorized adventures may be received and become blended with their legitimate business and funds so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the dealing, it is a self-evident proposition that no rule of estoppel can change the result.

It is not uncommon, in charters of corporations, to lay express prohibitions upon them as a limitation of their powers, having in view the maintenance of some public policy; as, for example, prohibitions relating to the currency of the State. If they violate these prohibitions, they have been supposed to be public offenders, and on that ground the law has always denied to them its remedial processes either in affirmance or disaffirmance of their unlawful contracts; thus regarding them as private offenders are regarded. But this rule of law must be overthrown, if we admit this theory of constitutional inability in corporations to overstep the limits of rightful power. In the case of *The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company* (7 Wend., 31), it was contended that a certain corporate transaction, if unlawful, was to be regarded as the act of the

agents or officers of the company, and not of the company, and, therefore, that the company should be allowed to recover back the money or property improperly disposed of. That doctrine was refuted by Mr. Justice SUTHERLAND in this language: "This would be a most convenient distinction for corporations to establish — that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." These remarks suggest an unanswerable argument against the doctrine. Why, it may be asked, does the law provide the remedy by *quo warranto* against corporations for usurpation and abuse of power? Is it not the very foundation of that proceeding, that corporations can and do perform acts and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the State interposes, alleges the excess or abuse, and on that ground demands from the courts a sentence of forfeiture.

One of the sources of error in reasoning upon legal as well as other questions, is, inexactness in the use of language, or, perhaps, in the perfectness of language, to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition, we use words in their literal and exact sense. In the same sense, it is a truth equally evident that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, or feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said they cannot exceed those powers; therefore, it has been urged that all attempts to do so are simply nugatory. The premises are correct when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the State, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense, natural persons are under the restraints of law, but they may transgress the law, and when they do so they are responsible for their acts. From this consequence corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through

which it may be exerted in modes of action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

A great variety of cases might be supposed, in which this doctrine of corporate exemption from liability could not be defended upon any rule of reason or principle of justice. But perhaps none of them would afford a more persuasive illustration than the one now under consideration. Let us look at the facts and consider the results. These corporations had boards of directors in whom were vested every power, faculty or function which belonged to the bodies they represented. We have then no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals. Indeed, in an important sense, they were the principals; because their authority was not received by delegation from any other principal. These boards proceeded to consolidate the two lines of road, and they included in the scheme another connecting road. This being done, they entered into all the relations of carriers with the public, and the entire business of both companies was thus conducted for a period of several years, with no complaint on the part of the State sovereignties which granted the charters, and none on the part of the shareholders. All the gains and profits of the business were received to the use of the corporations, and it is to be assumed that the shareholders were benefited thereby. The question arises, where were these companies and what were they doing during all this period? The question would be the same if that mode of conduct were to continue without limit of time. If the acts mentioned were in excess of the powers granted, and if we concede the doctrine that such acts are in all circumstances to be imputed to the agents who perform them, the conclusion follows, that the corporations became virtually extinct by a non-user of their franchises. If the business thus conducted was not the business of the companies, they were engaged in none whatever, and thus, practically, if not legally, ceased to exist. If it was the business of the directors as natural persons, then those persons must be deemed not only to have taken a wrongful possession of all the estate and funds of the corporations they professed to represent, but also to have usurped their franchises, and to have stolen their corporate names and seals. If this be the legal interpretation of the course of dealing and conduct actually carried on under the acts of incorporation passed by the legislatures of Michigan and Indiana, then the companies might have been proceeded against by those States, not on the ground of a usurpation of powers and privileges which did not belong to them, but for a total non-user of the franchises which did belong to them; while, on the other hand, writs of *quo warranto* might have been issued against the individual directors and agents for usurping corporate rights without any charter at all. (16 Wend., 655; 23 id., 193; 3 Bl. Com., 263.) These conclusions are not founded in any known principle or practice, and they are totally opposed to the facts

of the case. In rejecting them, we must also reject the theory of corporate perfection and immunities on which they were based; and we are compelled to hold that those companies, as legal and accountable persons, engaged themselves in the business of carrying passengers and freight under and according to the arrangements which have been mentioned, and thereby placed themselves in that relation to the public, and to the plaintiff in particular, which is the subject of the present controversy.

But the doctrine, that corporations can never be bound by engagements not justified by the grant of power from the State, is next defended on a different ground. Although it be conceded that they are present, and acting as legal persons, or entities, when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas, the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist, in the performance of acts perfectly lawful in themselves, but which, being done by a corporation, and not by individuals, are pronounced illegal because they are so done without authority contained in the charter.

But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a *malum in se* or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases (*The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 7 Eng. Law and Eq., 509; *McGregor v. The Deal and Dover Railway Co.*, 16 id., 180); but it was never established, and is not now received in the English courts. (*The Mayor of Norwich v. The Norfolk Railway Co.*, 30 Eng. Law and Eq., 120; *Eastern Counties Railway Co. v. Hawkes*, 35 id., 8, 37.) The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority

of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a school house or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business.

To illustrate the subject in another manner: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its powers from the State, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. My meaning, in short, is that the *illegality* of an act is determined in its quality and does not depend on the person or being which performs it.

There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But, suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant of power from the sovereign authority of the State. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises, as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover

nearly the whole field of corporate rights. It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business with greater advantages; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires*; and if the directors of such a corporation, as I am here speaking of, do the same thing, their acts are also *ultra vires* in the same sense and no other. To apply the word "illegality" to such transactions, is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offences.

In every treatise upon the law of contracts — and there are many of them — we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim, "*ex turpi contractu non oritur actio*," can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their dealings outside of their charters are deemed illegal for that cause. Even the proceeding against them by *quo warranto*, for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. (2 Kyd on Corporations, 439; Angel & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf., 267.) Our statute on this subject makes it the duty of the Attorney-General to institute the proceeding, under leave of the court, when the case is one of public interest, but, in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the State. (2 R. S., 583, §§ 39, 40.) In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the non-user or misuser of the franchises granted to a corporation, it is purely a civil right which is tried, and the judgment is not penal, but simply one of ouster from the

right claimed. The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the State, and may declare such acts to be public offences, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the State. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to State policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments in any sense which is material to the present inquiry. I do not deny that there is, in a different sense, a legal wrong in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract. But the true inquiry here is, whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the courts must, in all circumstances, accept that defence without regard to the situation and rights of the other party. I cannot believe such to be the rule of reason or of law.

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may and often do exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract — in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is also *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corpora-

tion are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached where they are not attended by the vices which are fatal to private contracts also. I have shown, I trust, 1. That such dealings are possible in law, as they often take place in fact: in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality so as to avoid the contract, or dealing, on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but, on the contrary, are innocent and lawful in themselves. 3. Even illegal contracts, in the proper sense, are not, universally and indiscriminately, to be adjudged void; and, especially, this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offence.

If these negative conclusions cannot be denied, it follows that contracts and dealings, such as I have been speaking of, are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of the corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle, justly applied to particular instances, the question in such cases is to be resolved. The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of *ultra vires*. That term is of very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defence in all cases of excess of power, without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make; but, because such was the nature of the contract, it presents the breach of trust or duty to the shareholders as an excuse for the non-performance. And I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be



enforced by the courts where no greater equities demand it. Corporate bodies are more than mere agents. They are more than a partner who manages as the agent of his associates. Their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust.

But the equitable rights of shareholders will enable them, in many circumstances, to claim the affirmative interposition of the courts to arrest an unauthorized course of dealing, or to prevent a threatened diversion of the capital to improper uses. Of this character are many of the cases usually cited, to prove that corporations cannot exceed their powers. (*Dodge v. Woolsey*, 18 How. U. S., 331; *Rolf v. Rogers*, 3 Paige, 154; *Angel & Ames on Corp.*, 424, 4th ed., and cases cited.) So, too, it is plain, without citing authority, that a stockholder, who can show that he has sustained a pecuniary loss by such a use of the capital, may have his redress in damages against the individuals who commit the wrong, unless he has himself acquiesced. These are extensive, and, it would seem, ample remedies to prevent or redress the abuse of power; and it appears to me a much higher and better policy, that the private shareholders should be confined to these remedies, than to sacrifice the interests of the rest of community by conceding to these bodies absolute immunity whenever power is thus abused. But the principles which belong to this question need not present that naked alternative. In many cases no injustice will be done by receiving the plea of *ultra vires*, when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer, and where the defence, if allowed, will leave the parties substantially in the enjoyment of their previous rights. An artificial, not less than a natural person, having the title and possession of an estate which, in equity, belongs to others, and entering into engagements inconsistent with duty or trust, should have a *locus penitentie*, where it can be allowed without manifest wrong to others. It may be difficult to lay down a rule so general and so exact as to include every case; but the principles and analogies of the law will be sufficient for the solution of such questions as they arise. Justice, not only in this, but in very many other cases of constant occurrence, can be administered according to law, if I have succeeded in showing, negatively, that a comparison of the charter of a corporation with what it actually does is not always the test of liability.

It is said that there will be no restraint upon the acts and dealings of corporate bodies, if we uphold them when in excess of rightful authority. To this I answer, that the most ample restraints will be found in the principles here advocated; while, on the other hand, if we concede to corporations immunity in all cases when they do wrong, we invite and reward the very abuse. It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position

necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money, or value, under and according to it; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is claimed to rest: for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer, further, that while in many cases the remedy of a suit in disaffirmance of the agreement, and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the service of carrying him in their cars, perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was \$2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance because the agreement was *ultra vires*, must be quite apparent.

I have examined these questions with the more attention, because, aside from their bearing on the present controversy, they are of great practical importance. A vast amount of the business of the community has come to be carried on under corporate forms of organization. Besides innumerable special charters, we have general laws which impart corporate attributes to associations formed according to articles of agreement, for a great variety of purposes. When we consider these to be any less than partnerships, with the superadded privileges of succession, of a corporate seal, &c., we forget that corporations are no longer confined to the exercise of public or political franchises. These commercial, manufacturing, and trading bodies are brought into relation with almost every member of the community; and I think it greatly to be desired that, in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men.

If we could find the law to be settled in the manner which must be and is contended for in order to exonerate the defendants in this case from responsibility, it would be our duty to follow it. But such is not the case. There are, certainly, judicial opinions, and some adjudged cases, which countenance the extreme doctrines on which the defence must rest. Among these cases, a leading one is that of *Hood v. The New York and New Haven Railroad Company* (22 Conn., 502).

That case appears to go the length of holding that corporations cannot and never do perform acts in excess of their powers. No authority was cited for such a proposition, and it cannot, as I think I have shown, be maintained. Another extreme authority is, *Pearce v. The Madison and Indianapolis Railroad Company* (21 How. U. S., 442), where it appeared that a corporation, in furtherance of its general objects, although, strictly speaking, in excess of its powers, had entered into an engagement upon a consideration which it had received and appropriated. It was allowed to repudiate that engagement; but the principles of the question were not much discussed. A considerable number of other cases and *dicta*, of a character less marked, but tending in the same direction, might be referred to. But, on the other hand, there are well-considered authorities which sustain the principles advocated in this opinion. (*The Steam Navigation Co. v. Weed*, 17 Barb., 378; *The Silver Lake Bank v. North*, 4 Johns. Ch., 370; *The Chester Glass Co. v. Dewey*, 16 Mass., 94, 102; *The Bank of Genesee v. The Patchin Bank*, 3 Kern., 309, 314; *Bulkley v. Derby Fishing Co.*, 2 Conn., 252, 255; *Parker v. The Boston and Maine R. R.*, 3 Cush., 107, 108; *Alleghany City v. McClurkan et al.*, 14 Penn., 83; 29 Verm., 93.) In the case from 2d Connecticut, it was said: "A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire immunity to the prejudice of third persons?" It will be found, indeed, that such a doctrine is of very modern origin. In the case from 14th Pennsylvania, COULTER, J., observed: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly; and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank, which has been long in the habit of doing business of a particular description, would not be exonerated from liability because such business was not expressly authorized in its charter. The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the acts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly and in such a manner as, by necessary and irresistible implication, to be within the knowledge of the corporators." "One rule of law," he adds, "is often met and counterchecked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust and confide in the unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them." A more particular discussion of the authorities on either

side, would not be profitable. The general question is one which ought to be considered on principle; and I have so viewed it, because I find no settled rule which stands in the way of such an examination.

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simple wrongdoers. If their contract was *ultra vires*, and that defence to an action upon it must be received as absolute and peremptory—if no principle of estoppel or rule of justice can be urged against that defence—then it is more clear that the simple wrong to the plaintiff's person was also *ultra vires*. It was with considerable difficulty that the liability of a corporation in any case for a pure tort was ever established; and they are never so liable except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants' express undertaking was absolutely void, so that no duty could arise thereupon, the implied undertaking resulting from the actual attempt to carry the plaintiff as a passenger is encountered by the same objection; and there is nothing left of the transaction except a pure and simple tort, committed by the defendants' servants while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain that this theory of liability will not sustain the plaintiff's case.

But I have no hesitation in affirming the judgment of the court below, upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them was chartered to build a railroad, the termini of which were specified. They built the roads, and then consolidated their business. The common interest might thus be promoted; but it is difficult to affirm that the charter of either authorized its capital to be thus blended with that of the other. It is equally difficult to hold that they had any rightful authority to construct or lease another road in continuation of the line. But these things were actually done, and they were done openly and publicly. If these acts were an abuse of power, the shareholders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed. If State sovereignties were wronged by the course of dealing pursued, no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public, and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveler into their cars, and, after injuring him by their negligence, reject the

responsibilities of their contract. A traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations. The present case, in short, plainly falls within the principles of corporate liability herein asserted, and the defendants must respond to that liability. The judgment should be affirmed.

SELDEN, J. It was not strenuously insisted upon the argument that the acts of these two railroad companies in entering into the arrangement found by the referee, and in running their cars upon joint account through the States of Ohio, Indiana and Illinois, were authorized by law; nor have I been able to find in the statutes of those States any sufficient warrant for these acts. I shall assume, therefore, that in undertaking to carry the plaintiff from Chicago, in the State of Illinois, to Toledo, in the State of Ohio, the defendants exceeded their corporate powers; and, as the allegation in the complaint, of carelessness and negligence on the part of the defendants, or their agents, is fully sustained by the finding of the referee, the defence must rest exclusively upon this want of power. The counsel on both sides have treated the action as founded upon contract, and in that aspect of the case the question arises whether want of authority on the part of a corporation, to enter into any engagement, is a valid defence to such corporation when sued for its violation.

This question has not until lately attracted much attention. But the recent rapid multiplication of these artificial bodies, and the extensive powers and privileges conferred upon them, have made it a question of importance. It has, within a few years past, been repeatedly presented to the courts, both in this country and in England, and with one unvarying result. I cannot, myself, regard it, therefore, as in any just sense open to discussion. If questions, which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then are we without any stable foundation of law or justice. The evils attendant upon setting legal principles afloat upon a sea of uncertainty and doubt, and causing them to depend upon the fluctuations of individual opinion are too obvious to need enumeration. Confidence in courts is only to be retained by their exhibiting stability in their own decisions, and a becoming respect for those of other tribunals. It has been so often and so uniformly decided that corporations are not bound by contracts which are clearly *ultra vires*, that to hold the contrary now would take the legal profession by surprise, and introduce more or less confusion into this important branch of the law.

But, while I protest against considering this as an open question, and insist that it should be treated as settled by authority, I also maintain that the numerous decisions on the subject by both the English and the American courts, rest upon a solid foundation of reason and principle. Much of the apparent force of the arguments used to prove the contrary, is produced by substituting entirely false basis for those decisions. If they really rested, as has been sometimes

supposed, upon the ground that because corporations are artificial beings, having no natural powers, but only such as are conferred upon them by law, they cannot by possibility do any act beyond the limits prescribed by their charters; and hence that no such act, although done by their agents, in their name, and for their benefit, can be considered as a corporate act, but must in all cases be treated as the personal act of such agent, it would, indeed, be easy to show their fallacy. This would be, as is justly said, to attribute to them a degree of perfection that belongs to no earthly existence, whether natural or artificial. To present this as the true foundation of the rule, which exempts corporations from liability for their unauthorized acts, is entirely to misapprehend the whole doctrine on the subject.

No court has ever held that the defence of *ultra vires* rested upon any such ground, as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction, so frequently drawn, between natural persons and corporations as mere artificial existences with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightfully exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers. The case of *Burry v. The Merchants' Exchange Company* (1 Sandf. Ch. R., 280), will serve to illustrate the force and application of the distinction. The question in that case was, whether a corporation, created for the purpose of erecting a building to be used as a public exchange, in the city of New York, had power to borrow money to enable it to accomplish the object of the incorporation, no provision conferring this power being contained in the charter. The Vice-Chancellor, in deciding this question in the affirmative, said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations *in the same manner as an individual*." This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory, and is designed to show, that as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defence its own want of power to enter into the contract, two questions are involved: first, whether the contract was, in truth, beyond the corporate powers; and, second, if so, whether this is available as a defence. It is only in reference to the first of these questions, and to prove that the contract was really *ultra vires*, that the argument has been resorted to, that a corporation has no natural powers. The excess of power being established, the question, whether this constitutes a valid defence, depends upon entirely different considerations.

The assumption, therefore, that the doctrine, which declares the

unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done anything but what it had a legitimate right to do, is wholly unwarranted; and, hence, the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case. Corporations, as well as natural persons, may, no doubt, err. They may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise, they could never be made liable for a tort; nor could they be proceeded against by *quo warranto*. The statute which authorizes the Attorney-General to file an information in the nature of a *quo warranto* against an offending corporation (2 R. S., 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision 5 of the section referred to provides that the proceeding may be instituted "whenever it (the corporation) shall exercise any franchise or privilege not conferred upon it by law."

The real ground upon which the defence of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based, is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts, viz.: those which are *mala in se*, i. e., which embrace something which the law deems in and of itself criminal or immoral; 2d, those which violate the provisions of some statute, and are hence called *mala prohibita*; and, 3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is that it exceeds the corporate powers, it cannot be considered as *malum in se*; and although, in this State, where we have a statute (1 R. S., 600, § 3), expressly enacting that no corporation shall exercise any corporate powers except such as their charters confer, the contrary might, with much plausibility, be contended. I shall, nevertheless, concede, for the purposes of this case, that such contracts do not belong to the class styled *mala prohibita*.

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception. Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are

illegal and void. Those, therefore, who hold that corporations are liable upon their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position. Here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument, by which it is sought to be shown that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said that a private corporation is simply a chartered partnership, possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business: that, even in unincorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are, for the same reason, specified in the charter: that the charter simply takes the place in this respect of the articles of agreement, in the case of an unincorporated partnership: that, as the objects of such associations, although incorporated, are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporation should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators, so that any excess of power on their part amounts simply to a breach of trust towards their principals, it would not follow that the corporation is liable upon its unauthorized contracts. But I apprehend there are serious objections to this view of the nature of corporations, and of the effect of their charters. In the first place, if there is no public interest involved, how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges, which give them great advantages over mere private citizens, whether individual or associated. The grant of such privileges upon the principles for which some of my associates contend, would be a pure piece of legislative favoritism, which should be indignantly condemned. In this country, if in no other, it is held to be the duty of government to protect the people in the enjoyment of *equal* rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarily at the expense of others; and it is against the fundamental principles of our government that this should be done, unless required by interests of a public nature. No doubt these principles are frequently violated, and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant in every case.



Take, for instance, the very class of corporations in question here, viz., railroad corporations, which are mere private associations, organized by their members with a view to their personal profit and emolument; and yet their creation is considered so much a matter of public interest as to invoke the power of eminent domain, by which the property necessary for their purposes is forcibly taken from its owners as for a public use. The same is true of telegraph and plankroad incorporations. But, although the interest of the public in the creation of corporations of this class is made a little more obvious by the necessity which exists of taking from others property which is specific and tangible, for the purposes of the corporation, yet the same principle applies to all corporations; for in all some value, corporeal or incorporeal, is taken from a portion of the community and given to the corporators.

Will it be said that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such powers? It is, obviously, impossible to support such a position. The franchises and privileges given to corporations belong to the public; and it would be just as reasonable, and just as logical, to contend that, under a patent for one hundred acres of land, the patentee might take possession of two hundred without infringing any public interest. Every additional power given to, or usurped by, a corporation, extends its advantages over persons unincorporated. If a bank is permitted to trade in merchandise, it comes in competition with others so employed. If a railroad company is allowed to build and sail ships, it comes in competition with those engaged in commerce; and so of every other branch of business.

The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them, must, I think, be obvious. They are rapidly multiplying. Their privileges give them decided advantages over mere private, unincorporated partnerships. They have large capitals and numerous agents, and are capable of entering into combinations with each other. They are not only formidable to individuals, but might even, under some circumstances, become formidable to the State. They are, or should be, created, as we have seen, for public reasons alone; and the legislature is presumed, in every instance, to have carefully considered the public interest, and to have granted just so much power, and so many peculiar privileges, as those interests are supposed to require. This reasoning is confirmed by the action of the legislature, in expressly prohibiting corporations from exercising any powers not granted to them. (1 R. S., 600, § 3, *supra*.) By making this principle of the common law the subject of an express and positive enactment, the legislature has shown that it considered this restriction upon corporations to be a matter of public interest and importance.

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a *quo warranto*, is in itself proof that the public has an interest in keeping such bodies within the limits of their charters. But it is said, that the proceeding by *quo warranto* is of a purely civil nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed. Upon this position I take issue. In the first place, the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the Attorney-General is authorized to institute proceedings in the nature of a *quo warranto*, contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases, viz.: Whenever a corporation shall "1st, Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or, 2d, Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d, Whenever it shall have forfeited its privileges and franchises by non-user; or, 4th, Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or, 5th, Whenever it shall exercise any franchise or privilege not conferred upon it by law." (2 R. S., 583, § 39.)

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders. They all, without exception, relate to violations, not of individual rights, but of public law. These provisions, therefore, strongly, and, as I think, conclusively repel the idea, that a *quo warranto* is a mere civil remedy, the object of which is to redress or prevent a private injury. The proceeding is not only public and *quasi* criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed will afford the proper redress. There is neither occasion for, nor propriety in, a resort to the proceedings by *quo warranto* for any mere private purpose, and I hazard nothing in saying that such is not the nature of that proceeding. If this conclusion is right, it inevitably follows that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and therefore illegal.

This, then, is the true foundation of the defence we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act, as a defence to a suit brought to enforce a contract which public policy forbids, viz.: to discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized.

It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act, are afterwards sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel in the case of *Regina v. White* (4 Ad. & El., N. S., 101), that for public reasons, officers so situated were not estopped; but Lord DENMAN said, "We have held that this is true only of a statute the contents of which are publicly known; such a statute is to have effect whatever dealings may take place; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterwards dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." This doctrine, which was also held in the case of *Doe, ex dem. Levy v. Horne* (3 Ad. & El., N. S., 757), will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But, aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought upon it.

In referring to the cases which support these views, I will notice the English cases first. There are three classes of cases in England in which the question of *ultra vires* arises, viz.: 1st, Cases in which one or more of the shareholders seeks to restrain the officers of the corporation from engaging in transactions unauthorized by the charter. 2d,

Actions brought by third persons against corporations to enforce their contracts, in which the defence relied upon is, that in making the contract the corporation exceeded its corporate powers. And 3d, Similar actions, in which the defence is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors or managing officers by deed.

These three classes of cases differ materially in their nature and principles, and if we would avoid confusion, must be kept entirely distinct in investigating the subject. Those of the third class have no bearing upon the question we are discussing. There are in England a class of corporations organized under general laws, which do not specify the manner in which the objects and purposes of the incorporation are to be effected, but leave this to be arranged by a "deed of settlement" between the corporators themselves. By this deed, the companies prescribe and limit the powers and functions of their various officers, so far as they are left uncontrolled by the statute, and the general laws of the kingdom. Now it is plain, that there is no analogy between an act which merely transcends the limits of this deed of settlement, and one which violates the provisions of the organic act. The deed of settlement is the private act of the shareholders; and its provisions have respect solely to their private interests. It is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved, when the question is, whether the officers have exceeded the authority conferred by this deed. The case of the *Royal British Bank v. Turquand* (5 El. and Bl., 248), is one of this class of cases. By comparing the language of Lord CAMPBELL in this case with that used by him upon another occasion, we shall obtain a clear view of the distinction here adverted to. In the case cited, the action was upon a bond signed by two of the directors, and the question was, not whether the giving of the bond exceeded the powers which the corporation itself had a right to assume, but whether it was authorized as between the shareholders and the directors by the deed of settlement. Lord CAMPBELL, in delivering his opinion, said: "A mere excess of authority by the directors we think would not amount to a defence." Of course by this was meant merely an excess of authority by the directors as the agents of the stockholders, and not an unauthorized assumption of power as between the corporation and the public.

In the *Mayor of Norwich v. The Norfolk Railroad Company* (30 Eng. Law and Eq., 120), the same learned judge fully recognizes the distinction I take, and shows that by the remark just quoted he by no means meant to say, that corporations were bound by contracts which are *ultra vires*, as between them and the public. He then says: "The mere circumstance, of a covenant by directors in the name of the company being *ultra vires as between them and the shareholders*, does not necessarily disentitle the covenantee to sue upon it. . . . But suppose

that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors: . . . This would be an *illegal* contract to misapply the funds of the company, and the illegality might be set up as a defence."

The phrase *ultra vires* is applied in the English cases both to acts which simply exceed the powers conferred by the deed of settlement upon the officers as the agents of the shareholders, and acts which transcend the powers conferred by law upon the entire corporation. This indiscriminate use of the phrase is calculated to mislead, unless the distinction referred to is observed. It is evident that the class of cases to which that of *Royal British Bank v. Turquand* belongs, have no bearing upon the question under consideration, and hence they will be no further noticed.

In all the cases belonging to the first class, the object of the action has been, to protect the private rights of the shareholders; upon the ground, that the action of the directors sought to be restrained would if permitted be a breach of trust. It would no doubt be a bar to any relief upon this ground, if it appeared that the parties seeking such relief, had themselves assented to what the directors were about to do. They clearly could not be entitled, for their own sake, to protection against acts which they had themselves authorized. But the courts, in cases of this kind, have uniformly, and no doubt properly, acted upon the presumption that the shareholders had not assented to a violation of the charter, and have interfered, if at all, for the purpose of protecting them from a breach of trust on the part of the directors.

Still it has been repeatedly said, even in cases of this class, that there was a question of public policy involved which would be sufficient of itself to induce the courts to interfere. The case of *Coleman v. The Eastern Counties Railway Company* (10 Beavan, 1), decided in 1846, was one of this class. It was an equity suit brought by a shareholder in behalf of himself and the other shareholders, against the corporation and its directors, to prevent the latter from entering into a certain agreement with the Harwich Steam Packet Company. The bill prayed for a declaration that it would be a breach of trust on the part of the directors to make the proposed contract, and for an injunction. Relief was granted. Lord LANGDALE, before whom the case was heard, speaking of the extensive powers of railway companies, said: "We are to look upon their powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be attained *by the public*." Again, he says: "In the absence of legal decisions, I look upon the acquiescence of shareholders, in these circumstances, in these transactions as affording no ground whatever for the presumption that they may be, in themselves, legal." Here, then, in one of the earliest cases on the subject, in the English courts, we have the very doctrine for which I contend, distinctly recog-

nized and asserted, viz.: that the object of every grant of corporate powers is to obtain a *public* benefit; and that the powers granted are the consideration which the *public* pays for the benefit received or expected; and we also have the inevitable consequence stated, that every excess of power by the corporation is *illegal* although acquiesced in by every shareholder.

Three years afterward the case of *Cohen v. Wilkinson* (13 Jurist, 641) came before the same judge. The complainant was a shareholder in the Direct Portsmouth Railway Company, and the object of the suit was to restrain the directors from proceeding to construct a portion only of the road authorized by the charter, without any preparation or intention to construct the whole. The judge said: "If it were established that the companies of this sort had authority, without a view to the whole, or for the purpose of performing the whole, to complete such part only as they please, or are able, or that which has been called their *contract or bargain with the public*, I think the consequences would be very dangerous to the *public* and to the shareholders, and probably productive of very extensive deception and fraud." In a similar case which arose shortly afterwards, viz., *Solomons v. Laing* (12 Beavan, 339), Lord LANGDALE said: "Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control or management of the directors, or governing body of the company, in any manner *not distinctly authorized* by the act of Parliament, is, in my opinion, an *illegal* application or dealing."

Thus we find Lord LANGDALE, on three different occasions, asserting, in controversies between the shareholders and the corporation, that all acts and dealings of the officers of such corporation which were unauthorized by their charters, were to be regarded, not simply as breaches of trust, but as illegal and therefore void. But Lord LANGDALE is not the only English judge who has held, in cases of this class, that the unauthorized contracts of corporations are illegal and void, as against public policy. In the case of *Beman v. Rufford* (6 Eng. Law and Eq. R., 106), which was an action brought by a shareholder in a railway company, to restrain the directors from carrying into effect a certain agreement made by them, Lord CRANWORTH, Vice-Chancellor, after stating his reasons for thinking the contract unauthorized, said: "And if that be the correct view of the law, I am clearly of opinion, on all the authorities and all principle, that it is the province of this court to prevent such an *illegal* contract from being carried into effect; because, on the principle that has been so often laid down, this court will not tolerate that parties having the enormous powers which those railway companies have obtained, shall lay out one farthing of the funds, out of the way in which it was *provided by the legislature* that they should be applied."

Now I understand those who differ with me on this subject to concede the principle of this case: that is, they admit, that for the directors to

enter into a contract which their charter does not authorize, would be a violation of their duty to the shareholders, and that the latter may apply to a court of equity and obtain an injunction restraining the directors from carrying the contract into effect. It would be difficult to deny this. For if we take the same view of the nature of a corporation which they take, and consider the directors merely as the agents of the shareholders, and the charter as nothing more than their power of attorney from the corporators, the latter, as the principals, would have a right to repudiate and prevent the execution of a contract, made in their behalf by their agents, without authority; inasmuch as every person dealing with such agents must, as is well settled, be presumed to know the extent of the powers which the charter confers.

The position then occupied by some of my associates is this: They admit that the shareholders in a corporation have a right to restrain its directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect if made; and yet they hold that the directors are liable, not in their individual, but their corporate character, to the party with whom the contract is made for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators. The latter constitute the corporation. Hence, by the two propositions just stated, it is maintained, that the corporators have a legal right to enjoin their representatives against the performance of a contract, which they themselves are legally bound to perform; in other words, they are liable for damages, because their representatives have not performed a contract, which they had a right to restrain those representatives from performing. This can hardly be. It would seem to be a legal impossibility. One or the other of these propositions must, I think, be false. Either it must be denied that the shareholders can invoke the aid of a court of equity to prevent the performance of a contract entered into by the directors, which the charter does not authorize — a principle established by numerous authorities — or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are not presumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers. But the contrary is the rule in respect to both.

It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust, and nothing more, the corporation is not bound by them. This however is not the ground upon which I have been endeavoring to maintain that corporations are exempt from liability upon their contracts which are *ultra vires*; nor is it the ground upon which such defences have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall therefore proceed further to show from the

authorities that such contracts are illegal and void for public reasons, entirely irrespective of the fact that they constitute breaches of trust towards the shareholders.

I shall cite but one additional case belonging to the first of the above classes, viz.: *Winch v. The Birkenhead, Lancashire and Cheshire Junction Railroad Company* (13 Eng. Law and Eq., 506.) That was a suit in equity brought by a shareholder to restrain the corporation from entering into an agreement, which amounted to a lease of the defendants' road to the London and North Western Company. The Vice-Chancellor, Sir J. PARKER, in disposing of the case used the following language: "It seems to me that it is not a question of simple incapacity on the part of the London and North Western Railway Company to undertake the working of this line, but that it is *against the policy* of these acts of Parliament: and I think therefore that the agreement for making over this property to them, is an agreement *savouring of illegality*, which any shareholder in the Birkenhead Company has a right to come to the court to restrain."

The cases thus far noticed were all cases between the shareholders and the directors of the corporation, in which of course the question as to the liability of the corporation to third persons could not arise; and they have been referred to chiefly for the uniform *dicta* they contain, asserting the illegality of all unauthorized corporate contracts. I shall now refer to a class of cases in which the question of the liability of the corporation upon such contracts was directly involved.

The first case of this class, to which I will call attention, is that of *East Anglian Railway Company v. Eastern Counties Railway Company* (7 Eng. Law and Eq., 505). That was a suit upon a contract made by the directors, and the defence was, that the contract was not warranted by the charter; and the court so held. JERVIS, Ch. J., speaking of the class of cases to which I have previously referred, says: "The cases in equity which have been cited, proceeded upon this view of the subject, and were decided, not because the particular act restrained by injunction was a *breach of trust*, but because it was not within the scope of the directors' authority, was not justified by the statute and was therefore *illegal*." Again he says: "If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissenting shareholders." This is a most explicit and emphatic judicial affirmation of the precise doctrine for which I contend, by the Court of Common Pleas in England, in a case in which there was no dissent.

The same doctrine has been held in several later English cases. Upon an application in *The Great Northern Railway Company v. Eastern Counties Railway Company* (12 Eng. Law and Eq., 224), for an injunction to restrain the defendants from interfering, contrary to an agreement between the parties, to obstruct the plaintiffs in their use of a part of the defendants' road, which was opposed on the ground that the agreement was *ultra vires*, the Vice-Chancellor said: "If,



therefore, this cause had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of the court to interfere to some extent by injunction; but I think *there lies at the root of this case a question of public policy*, which precludes the interference of the court." These two cases were directly upon the point; and they show the opinion of the Court of Common Pleas and the Court of Chancery.

The next case to which I shall refer, viz.: *McGregor v. The Official Manager of the Deal and Dover Railway Company* (16 Eng. Law and Eq., 180), was in the Court of Exchequer Chamber. It was an action at law to recover damages for the breach of a contract; and the defence was, that the contract was *ultra vires*. The judgment of the court was delivered by Baron ALDERSON, who said: "The Solicitor-General argued that this promise of the defendant was in truth a promise that the South Eastern Company should do an *illegal* thing, and that the promise was therefore void; and we are of that opinion. This is not like the promise of a party that an act *impossible* to be done shall be done by the defendant, or by some third person; but it is a promise that an act shall be done contrary to the *public law* of the country, of which both parties are bound to take notice. The act is therefore *illegal*, and the promise that it should be done is a void promise." The contract, concerning which this was said, was illegal in no other sense than that it was *ultra vires*.

In the subsequent case of *South Yorkshire Railway v. Great Northern Railway Company*, in the Court of Exchequer (9 Exch. R., 55), where the questions were, 1. Whether the contract upon which the suit was brought was authorized; and, 2. If not, whether that constituted a defence—the court gave judgment for the plaintiff, on the ground that the defendants, in entering into the contract, had not exceeded their corporate powers. But no doubt seems to have been entertained, that the contract, if *ultra vires*, would have been void. Barons MARTIN and PARKE expressly so held; and no opinion to the contrary was intimated by the other judges. It is true that Baron PARKE, at the close of his opinion, says: "I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants' company of the solemn contract into which they have fairly entered, and from which they are trying to escape." He had, however, previously laid down the rule as follows: "But where a corporation is created by an act of Parliament, for particular purposes, with special powers, then, indeed, another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear, by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*."

Sir WILLIAM ERLE, one of the justices of the Queen's Bench, appears to be the only one of all the English judges who ever entertained any serious doubt upon this question. In *The Mayor, &c., of Norwich v.*

*The Norfolk Railway Company* (30 Eng. Law and Eq., 120), where the question arose, he combated the doctrine; contending that, in all those equity cases in which corporations had been restrained, at the instance of the shareholders, from entering into certain engagements, the court had proceeded solely upon the ground that the contracts, if made, would have amounted to a breach of trust; and insisted that the contracts of corporations were only void at law when expressly prohibited. But, in the same case, Lord CAMPBELL and Mr. Justice COLERIDGE expressed their entire concurrence in the previous decisions.

The question was finally carried to the House of Lords, in the case of *Eastern Counties Railway Company v. Hawks* (35 Eng. Law and Eq., 8); and although the contract in that case was held to be within the powers of the corporation, and, therefore, binding, it was, nevertheless, expressly and fully conceded that, if it had been *ultra vires*, it would have been illegal and void. Lord Chancellor CRANWORTH, after citing the cases of *The East Anglian Railway Company v. The Eastern Counties Railway Company*, and *McGregor v. The Official Manager of the Deal and Dover Railway Company* (*supra*), said: "I have referred to those cases, and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think the present case comes within the principle on which these decisions have rested." Lord CAMPBELL, in the same case, also fully assents to the doctrine; and yet this case is cited and relied upon to support the views of those of my associates who differ with me upon this question. But it will be found, upon examination, that even Lord ST. LEONARDS, upon whose remarks they particularly rely, himself concedes the rule. He said: "The opinions of some of the judges in the Norwich case (*Mayor of Norwich v. The Norfolk Railway Company, supra*), favor the disposition which I feel to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into." To this I agree. So far from denying the principle for which I contend, it concedes it. He afterwards says, speaking of two cases decided by the House of Lords at the same session: "They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established; but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot *clearly* be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their *deed of management*." In this extract the judge again recognizes the doctrine, but insists that it should be made clearly to appear that the contract is

*ultra vires* before it is applied. His last remark evidently refers to the class of cases already noticed, in which the defence is, not that the directors, in making the contract, exceeded the statutory powers of the entire corporation, but only the powers conferred by the deed of settlement. Those cases, as we have seen, have no bearing upon the question under discussion.

This review of the cases in England leaves no doubt as to the law upon this subject there. The question has been before every judge and every court, has been presented in every possible form, and argued by men of the highest talent, and the result has been uniformly the same. If it is possible to settle this question by authority, this must settle it at least in that country.

I shall content myself with a brief reference to the American cases, beginning with those in this State. The question was directly presented to, and decided by, the Supreme Court in the case of *Safford v. Wyckoff* (1 Hill, 11). The action was against the defendant, as president of a bank organized under the general law of 1838, upon a bill of exchange or draft drawn by the bank, upon the North American Trust and Banking Company, in favor of one Dodge and indorsed to the plaintiff. It was held in this case, 1st, that the bank had no authority to issue drafts on time; and, 2d, that this constituted a good defence to the action. This case was prior to the entire series of English cases to which I have referred, and yet our court, without any of the light thrown upon this subject by those cases, placed its decision upon grounds, which the courts at Westminster, after the most elaborate discussion and examination, have fully confirmed. The opinion of the court was delivered by Mr. Justice COWEN, who says: "True, there is no nullifying clause in the statute against negotiable notes and bills, in whatever way or form issued, nor any positive prohibition or negative against them. But both are most obviously implied, not only in the general frame and scope of the statute, but more emphatically in its policy." In this sentence the judge met the argument that a contract which is merely unauthorized but not prohibited is not illegal. Another argument is answered by the following remark: "We admit the defence is an ungracious one, both as to Dodge and the drawers; it is not, however, *for their sake*, but for that of the statute *and the public* that we feel constrained to give full scope to their defence. There would be more difficulty in sustaining it, as to the indorser, were it not to be regarded as an obvious attempt by all parties to violate a principle of public policy."

Here, then, *in limine*, we have the doctrine placed, in this State, upon grounds which subsequent repeated examinations have shown to be just. It is true that this case was reversed by the late Court of Errors (4 Hill, 442). But as this reversal proceeded upon the ground, that the bank had power to issue the draft, it in no manner impairs the authority of the decision of the Supreme Court upon the point we are considering. Indeed the Court of Errors, itself, confirmed the doctrine

in the subsequent case of *McCullough v. Moss* (5 Denio, 567). Of the other cases in this State I will only notice those in this court, the most marked of which is the case of *Leavitt v. Palmer* (3 Constd., 19). This was an important case, and was elaborately argued. The suit was brought by a receiver of the company, and its object was to cause to be set aside and canceled, forty-eight promissory notes of £1,000 each, issued by the North American Trust and Banking Company, upon the ground that they had been issued contrary to the provisions of the act of May 14, 1840. The question, therefore, was directly involved, whether a corporation can avoid its own contract by showing that it was made in contravention of the provisions of a public statute; and the report of the case shows that this question was distinctly presented and argued by the counsel. It was held unanimously by the court, that the notes having been issued in violation of the act, were illegal and void, and could not be enforced against the company.

There is this distinction between that case and the present: There the contract which the company had entered into was expressly prohibited; here it is prohibited by implication merely. But the case to which I have referred shows that this does not change the rule. The decisions in those cases all rest upon the ground that the contracts, being within the implied prohibition of the statute, were void as made in contravention of the policy of the law.

No such distinction, however, exists between the case under consideration, and that of *Talmage v. Pell* (3 Seld., 328). That case involved the validity of three several contracts of the North American Trust and Banking Company, a corporation organized under the general banking law of this State, viz.: 1, a contract to purchase a large amount of State stocks of the State of Ohio; 2, certain certificates of deposit or promissory notes, issued by the company in payment for the stocks; and 3, an assignment of a certain bond and mortgage as security for the notes. Neither of these contracts were expressly prohibited by any law. The only objection to them was that they were not authorized by the act under which the company was incorporated; and this court held the contracts to be illegal and void upon that ground.

These cases show, that in this State, the late Supreme Court and Court of Errors, and this court, have all concurred in holding, in accordance with the numerous English cases to which I have referred, that the contracts of corporations which are *ultra vires*, are void and cannot be enforced. Similar decisions have been made by the courts of other States and of the United States: *The Pennsylvania and Delaware Canal Company v. Dandridge* (8 Gill. & John., 248); *Hood v. The New York and New Haven Railroad Company* (22 Conn., 502); *Elmore v. The Naugatuck Railroad Company* (23 id., 457); *Mutual Savings, &c., v. The Meriden Agency Company* (24 id., 159); *The Naugatuck Railroad Company v. The Waterbury Button Company* (id., 468); *Bank of Michigan v. Niles* (1 Doug. Mich. R., 401); *Orr v. Lacey* (2 id., 254); *Root v. Goddard* (3 McL.,

102); *Root v. Wallace* (4 id., 8); *Dodge v. Woolsey* (18 How. U. S. R., 331); *Pearce v. Madison and Quincy Railroad Company*, and *Peru and Quincy Railroad Company* (21 id., 441). I shall not consume time and space by referring to these cases particularly. If principles can ever be settled by authority, if the slightest respect is due to the opinions of other tribunals, it would seem that no court could resist the overwhelming weight of the decisions which have been cited.

The strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered, that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said, that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either; this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute, and every one who deals with them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, as where the want of power is not apparent upon the face of the statute, but depends upon the existence of some extrinsic fact known to the corporation, but not the party dealing with it, it has been already conceded that the corporation would be estopped from setting up that its contract was *ultra vires*.

But the injustice which can ever accrue to individuals from permitting the defence in question, is trifling, under the law as now settled, compared with the importance to the public of keeping corporations within their chartered limits. It has been repeatedly held by this court, that where corporations, by means of contracts or engagements prohibited by law, *i. e.*, which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may nevertheless be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the State, it at the same time protects individuals from any gross injustice.

My conclusion, therefore, is, that the contract of the defendants to transport the plaintiffs from Chicago to Toledo was illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured

by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was *ultra vires* and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars, when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants. It will scarcely be doubted that if the defendants' cars, through the carelessness of their employees, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee, unauthorized and contrary to law, is nevertheless to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that at least in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general towards persons sitting in their cars, but whom they have made no contract to transport. This must depend upon the circumstances under which the individuals had entered the cars. If

they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars, was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of *Nolton v. The Western Railroad Corporation* (15 N. Y., 444), that when a railroad company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation; yet this can make no difference, as the liability in such cases arises, not from any contract express or implied, but from the universal obligation of all persons to avoid injury to others through their negligence.

Suppose, while standing upon your own premises, you accidentally, but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of the company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injuries sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that when the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence, for the party injured, the former is only liable for gross negligence; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants. To this question there can be but one answer. The defendants can never

allege that the plaintiff was in their cars as a trespasser, when he was there by their express assent. The contract between him and the company, it is true, for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the plaintiff to leave the cars; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff by consenting to travel in the defendants' cars became a participator in their unlawful conduct, and hence is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case, is a law of restriction upon the defendants and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from traveling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent, and may have relief against the more guilty party even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party *a fortiori* may he claim redress for injuries consequent upon their *tortious* acts. He is so far regarded as *particeps criminis*, that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time or to transport him at all, whatever damages he might thereby sustain; but he cannot be said, like an outlawed felon, to have *caput lupinum* and thus to be liable to be knocked on the head like a wolf or to have his limbs broken with impunity. (4 Bl. Com., 320.) Upon these grounds I think the recovery was right, and that the judgment should be affirmed.

CLERKE, J., delivered an opinion for affirmance on the ground last stated by SELDEN, J. DENIO, J., was for reversal; all the other judges<sup>1</sup> were for affirmance, but without passing upon the questions discussed by COMSTOCK, Ch. J., and SELDEN, J.

Judgment affirmed.

<sup>1</sup> The other judges were DAVIES, J., WRIGHT, J., BACON, J., and WELLES, J. — ED.



## ASHBURY RAILWAY CARRIAGE &amp; IRON CO. v. RICHE.

1875. *Law Reports, 7 House of Lords*, 653.<sup>1</sup>

MR. JOHN ASHBURY had carried on at two places in *Lancashire* a very extensive business in making railway carriages and waggons, turn-tables, points, crossings, and roofs, and other things of a like sort needed by a railway company, but had not been concerned in the construction of railways themselves.

A company called "*The Ashbury Railway Carriage & Iron Company*," incorporated under the *Companies Act*, 1862, was started for the purpose of buying Mr. *John Ashbury's* business, and among the other articles in the agreement for its purchase was this, that the said *John Ashbury* shall not be interested (except as shareholder in a company) in "the business of a railway-carriage maker, iron manufacturer or contractor, or any other business or branch of business theretofore carried on by him at the said works."

A Memorandum of Association of the company, dated on the 12th of September, 1862, was drawn up. By the 3rd clause of this memorandum of association the objects of the company were thus defined: "The objects for which the company is established are to make and sell, or lend on hire, railway-carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of *mechanical engineers and general contractors*; to purchase and sell, as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission, or as agents."

[Portions of the Articles of Association are set forth in the case.]

In 1864 Mr. *Riche*, the Defendant in Error, was carrying on business in *Belgium*, in partnership with his brother (since deceased) as a railway contractor. On the 14th of March, 1864, the Belgian Government granted to certain persons named *Gillon* and *Bertsoen* a provisional concession for making a line of railway from *Antwerp* to *Tournay*, the payment of two sums of £4000 and £16,000 being settled as what is called "caution money." The two concessionaries desired a company to be formed to carry this concession into effect. It was agreed that Messrs. *Riche* were to have the construction of the line; and in the early part of 1865 the two concessionaries and Messrs. *Riche* and the directors of the *Ashbury Company* met together, and agreed to form a company (*Société Anonyme*) to work the concession. The arrangement was for the *Ashbury Company* to purchase the concession from Messrs. *Gillon* for £70,000, and to give the contract for its construction to Messrs. *Riche*, the company thus becoming, in fact, the contractor for

<sup>1</sup> Statement abridged. The arguments of counsel and portions of the opinion of LORD CAIRNS, are omitted. The concurring opinions of LORDS CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE are omitted. — ED.

the construction of the line. In this negotiation Mr. *James Ashbury*, one of the directors of the English company, represented that company, and entered into the contracts. Sir *Cusack Roney* afterwards acted in the same character.

The formation of a *société anonyme* in *Belgium*, and the agreement with Messrs. *Riche* that they should construct the line — the *Ashbury* company undertaking to supply the *société anonyme* with the requisite funds — was said to have been adopted because the rails, &c., supplied by a Belgian house would be free from the duty that the Belgian Government imposed on rails imported from *England*, and consequently the profit from the construction of the line would be increased. Messrs. *Riche* began and for some time continued the works for the construction of the line; and for some time, too, the *Ashbury* directors paid, in the name of their company, money to the *société anonyme* to which Messrs. *Riche* had become entitled.

Difficulties about payment arose as the work went on, the English shareholders not adopting the views of their directors as to the speculation.

[The case sets forth various proceedings at meetings of stockholders; the claim being made by plaintiff's counsel that the stockholders of the *Ashbury Company* had ratified the contract entered into in the name of the Company.]

The *Ashbury Company* repudiated the contract for constructing the line as one *ultra vires*. Messrs. *Riche* brought this action for damages for breach of contract. The case was referred to a barrister to state a special case; the Court to be at liberty to draw inferences of fact.

The case setting forth the above matters was first heard before the Court of Exchequer. Two judges against one decided that the verdict should be entered for the plaintiffs, the Messrs. *Riche*. L. R. 9 Exch. 224. The case was then taken on error to the Exchequer Chamber. The judges in that Court being equally divided, the judgment of the Court below was affirmed. L. R. 9 Exch. 249. Error was then brought to the House of Lords.

*Watkin Williams*, Q.C., and *Cohen*, Q.C., for the plaintiffs in error (the original defendants).

*Giffard*, Q.C., and *Benjamin*, Q.C. (*W. G. Harrison* with them), for defendants in error (the original plaintiffs).

LORD CAIRNS, LORD CHANCELLOR.

The action was brought by the Plaintiffs, who appear to be contractors in *Belgium*, and it was brought for damages for the breach of an agreement entered into between the Plaintiffs and the shareholders, constituting the *Ashbury Railway Carriage and Iron Company, Limited*.

These persons constituted a company established under the *Joint Stock Companies Act* of 1862. I think your Lordships will find it necessary to consider with some minuteness some of the leading pro-

visions of that Act of Parliament. But, in the first place, you will find it convenient to ascertain the purposes for which this company was formed, and then the nature of the agreement, or contract, for the breach of which the present action was brought.

The purposes for which a company, established under the Act of 1862, is formed, are always to be looked for in the Memorandum of Association of the company. According to that Memorandum, the *Ashbury Railway Carriage and Iron Company, Limited*, is formed for these objects — “to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.” Part of the argument at your Lordships’ Bar was as to the meaning of two of the words used in this part of the memorandum — the words “general contractors.” My Lords, as it appears to me, upon all ordinary principles of construction those words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works. First, “to make and sell or lend on hire railway carriages and waggons and all kinds of railway plant, fittings, machinery, and rolling stock. That is an object *sui generis* and complete in the specification which I have read. The second is “to carry on the business of mechanical engineers and general contractors.” That, again, is the specification of an object complete in itself; and, according to the principles of construction, the term “general contractors” would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers — such contracts as mechanical engineers are in the habit of making, and are in their business required, or find it convenient, to make for the purpose of carrying on their business. The third is, “to purchase, lease, work, and sell, mines, minerals, land, and buildings.” That is an object pointing to the working and the acquiring of mineral property, and the generality of the last two words, “land and buildings,” is limited by the purpose for which land and buildings are to be acquired, namely, the leasing, working, and selling, mines and minerals. The fourth head is, “to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.” That requires no commentary.

My Lords, if the term “general contractors” were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description, and the memorandum in place of specifying a particular kind of business would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning.

My Lords, that being the object for which the company professes by the memorandum of association to be incorporated, I now turn to examine the contract upon which the present action is brought. I may relieve your Lordships from any lengthened exposition of the nature of that contract by referring you to the account given of it by Mr. Baron *Bramwell* in the Court of Exchequer, which appears to me accurately to describe the general nature of the contract. Mr. Baron *Bramwell* states this:<sup>1</sup> “The substance of those contracts” — that is, the contract upon which the action was brought, and two other contracts, which are inseparably connected with it — “The substance of those contracts was this: *Gillon* and *Baertsoen* had obtained the right to make a railway in *Belgium*. This right the Defendants’ directors supposed to be valuable to its owners; that is to say, the line could be constructed for a certain sum, and a *société anonyme* could be constituted with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the Defendant company, and to do so purchased the concession. This was their main object. But the Plaintiffs held a contract with the concessionaries to construct the line, and to accomplish the directors’ object it was necessary or desirable, or they thought it was, that they should agree with the Plaintiffs that the Defendants should constitute a *société anonyme*, and, as the Plaintiffs went on with the work, the Defendants should pay into the hands of the *société* proportionate funds. The farther contract entered into in the Defendants’ name, called *D.*, is of no importance in this case. The directors accordingly entered into two contracts in the Defendants’ name — one with the concessionaries to purchase the concession; the other with the Plaintiffs to furnish the *société anonyme* with funds, the latter contract being auxiliary to the former. They paid the concessionaries £26,000, part of the price. Now, whatever may be the meaning of ‘carry on the business of mechanical engineers and general contractors,’ to my mind it clearly does not include the making of either of these contracts. It could only be held to do so by holding that the words ‘general contractors’ authorized generally the making of any contracts; and this they certainly do not.”

My Lords, I agree entirely, both with the description given here by Mr. Baron *Bramwell* of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company were to be the employed, they were the employers. They purchased the concession of a railway — an object not at all within the memorandum of association; and having purchased that, they employed, or they contracted to pay, as persons employing, the Plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum

<sup>1</sup> Law Rep. 9 Ex. 234.

of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association.

Those being the results of the documents to which I have referred, I will ask your Lordships now to consider the effect of the Act of Parliament — the *Joint Stock Companies Act* of 1862 — on this state of things. And here, my Lords, I cannot but regret that by the two Judges in the Court of Exchequer the accurate and precise bearing of that Act of Parliament upon the present case appears to me to have been entirely overlooked or misapprehended: and that in the Court of Exchequer Chamber, speaking of the opinion of those learned Judges who thought that the decision of the Court of Exchequer should be maintained, the weight which was given to the provisions of this Act of Parliament appears to me to have entirely fallen short of that which ought to have been given to it. Your Lordships are well aware that this is the Act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability.

The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind. And I will ask your Lordships to observe, as I refer to some of the clauses, the marked and entire difference there is between the two documents which form the title deeds of companies of this description — I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the

directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company.

[Here his Lordship quoted and commented upon various clauses of the Companies Act of 1862.]

The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit.

Now, my Lords, bearing in mind the difference which I have just taken the liberty of pointing out to your Lordships between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression "illegality."

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. I endeavoured to follow as accurately as I could, the very able argument of Mr. *Benjamin* at your Lordships' Bar on this point;

but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized.

My Lords, if this be the proper view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber; because I find Mr. Justice *Blackburn*, whose judgment was concurred in by two other Judges who took the same view, expressing himself thus:<sup>1</sup> “I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.” My Lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice *Blackburn*, every Court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

My Lords, that relieves me, and, if your Lordships agree with me, relieves your Lordships from any question with regard to ratification. I am bound to say that if ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation.

I have only to add to what I have already said, that I observe that some cases have been referred to here—those arising out [of] the *Agriculturist Cattle Insurance Company* in your Lordships’ House,<sup>2</sup>

<sup>1</sup> Law Rep. 9 Ex. 262.

<sup>2</sup> *Spackman v. Evans*, Law Rep. 3 H. L. 171; *Evans v. Smallcombe*, Ibid. 249; *Houldsworth v. Evans*, Ibid. 263.

and the case of the *Phosphate of Lime Company v. Green*, in the Court of Common Pleas<sup>1</sup> — as if they had some bearing on the present question. Those cases have a bearing upon some of the observations with which I have troubled your Lordships. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases which I have mentioned the whole question was, whether the directors had gone beyond the powers which were entrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded.

Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

My Lords, for the reasons which I have thus endeavoured to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the Defendants.

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DAVIS *v.* OLD COLONY R. CO.  
DAVIS *v.* SMITH AMER. ORGAN CO.

1881. 131 *Mass.* 258.<sup>2</sup>

GRAY, C. J. These actions are brought upon an agreement, signed by the Old Colony Railroad Company in the sum of \$6000, and by the Smith American Organ Company in the sum of \$5000, and by other corporations, partnerships and individuals in various sums, amounting in all to more than \$200,000.

The agreement is in these words: “ Boston, January 23, 1872. We the undersigned subscribers hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the World’s Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed: provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred

<sup>1</sup> Law Rep. 7 C. P. 43.

<sup>2</sup> A large part of the opinion has been omitted. The omissions consist mostly of statements of reported cases and extracts from the opinions in such cases. — Ed.



thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding; that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than \$200,000.

The only point argued and decided when one of these cases was before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee therein mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. *Davis v. Smith American Organ Co.* 117 Mass. 456.

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question, the court is of opinion that the agreement is *ultra vires*, and therefore, no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a

certificate showing the purpose for which the corporation is constituted. Gen. Sts. c. 3, § 5. St. 1870, c. 224, §§ 7, 11. *Whittenton Mills v. Upton*, 10 Gray, 582, 598. *Richardson v. Sibley*, 11 Allen, 65, 72. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, 443. *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, 811. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, 398, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party.

[After stating, and commenting upon, numerous cases, the opinion proceeds:]

Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. *Chester Glass Co. v. Dewey*, 16 Mass. 94. *Old Colony Railroad v. Evans*, 6 Gray, 25. *National Pemberton Bank v. Porter*, 125 Mass. 333. *National Bank v. Matthews*, 98 U. S. 621.

[After stating, and commenting upon, these cases, the opinion proceeds:]

A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White v. Franklin Bank*, 22 Pick. 181. *Morville v. American Tract Society*, 123 Mass. 129, 137. *In re Cork & Youghal Railway*, L. R. 4 Ch. 748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Railways v. Eastern Counties Railway*, *Macgregor v. Dover & Deal Railway*, *Ashbury Railway Carriage & Iron Co. v. Riche* and *Thomas v. Railway Co.*, above cited. *Downing v. Mt. Washington Road Co.* 40 N. H. 230. *Franklin Co. v. Lewiston Institution for Savings*, 68 Maine, 43.

The Old Colony Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. Sts. 1844, c. 150; 1854, c. 133; 1862, c. 149; 1872, c. 143. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be

*Judgment for the defendant.*

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, c. 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof filed in the office of the Secretary of the Commonwealth pursuant to that act, to "the manufacture and sale of reed organs and other musical instruments." The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guarantee the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of *Ashbury Railway Carriage & Iron Co. v. Riche*, before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiffs' exceptions must be

*Overruled.*

*M. F. Dickinson, Jr. & J. Fox*, for the plaintiffs.

*J. H. Benton, Jr.*, for the defendant in the first case.

*R. D. Smith*, (*C. Allen* with him,) for the other defendant.

## DENVER FIRE INS. CO. v. McCLELLAND.

1885. 9 *Colorado*, 11.<sup>1</sup>

ACTION by McClelland (plaintiff below) against Insurance Company.

Plaintiff's complaint alleges that, on June 12, 1882, defendant company issued a policy insuring plaintiff's growing crops against loss or damage by hail; that this policy was issued in consideration of \$3.00 cash paid by plaintiff, and also of a note for \$58.03 executed and delivered by plaintiff to defendant; and that on June 19, 1882, plaintiff's crops were damaged by hail.

Defendants' answer set up, as second defence, that the defendant company's articles of incorporation were duly recorded in two public offices long before the issuing of said policy; that under said articles the company has no authority to insure growing crops against damage by hail; and is authorized to insure property only against damage by fire or lightning.

The plaintiff demurred to this second defence. The demurrer was sustained. After assessment of damages, judgment was rendered for plaintiff, and the Insurance Company appealed.

*Stallcup, Luthe & Shaffroth*, and *Teller & Orahood*, for appellant.

*Norville & Clark*, and *T. M. Robinson*, for appellee.

STONE, J. The sole question in this case is whether the appellant can avail itself of the *ultra vires* of the contract upon which its liability, if any, arises as a defense to the action.

[After fully stating the pleadings, and the proceedings in the case, the learned Judge continues as follows:—]

The authorities cited on both sides of the case are very numerous. Questions touching the *ultra vires* of corporations have been before the courts of probably every state in some shape, and various phases of the question have been many times considered by the federal courts, while standard text-books are full of research and discussion upon the entire subject. We have examined these authorities with care, but a review of them here would be unnecessary labor, since both the English and American authorities have been collated and discussed fully in many of the leading cases cited by counsel in their briefs filed in the case. In respect to the precise question before us, there is apparently much conflict of opinion in the decisions of the courts, such conflict being in many cases apparent only, but in others squarely antagonistic. It is quite well settled as a general rule that a corporation possesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects and purposes of its creation.

<sup>1</sup> The statement in the opinion is abridged. — Ed.

On the one hand, it is held by some authorities that acts of a corporation in excess of the powers limited by the foregoing rule are illegal, that any contract made in such excess of lawful authority is void and not enforceable, and that neither party to an action founded thereon is estopped to plead the *ultra vires* of the contract in bar of such action.

On the other hand, it has come to be the settled doctrine of several states that a corporation may be estopped to deny its authority to enter into a contract which has been executed, and from which it has derived the benefit which it thereby sought. There seems to be a growing tendency to this doctrine in modern decisions in this country and it is also supported by the authority of English cases.

As is said in *Parish v. Wheeler*, 22 N. Y. 494, a leading case upon this subject in the United States: "The executed dealings of corporations must be allowed to stand for and against both parties where the plainest rules of good faith require."

Mr. Waterman, in his late excellent treatise upon the specific performance of contracts, says that it is now settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. Sec. 226. So if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

It is not contended that the payment of the note was a condition precedent to his right of action against the company, since, at the time of bringing the action, the note lacked two months of maturity, and there was nothing to be done or performed by him under the contract. The performance already made by the appellee had been accepted by the appellant company, and, so far as it was concerned, the execution of the note was the same as a cash payment in full of the amount; the company had the benefit thereof. It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defense of *ultra vires*, here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the

chief reason for the rule of decision in the cases which sustain the defence of *ultra vires*.

That the public has such an interest is quite true, but whether to afford such protection the defense of *ultra vires* is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrong-doing. Such policy would rather seem to offer a premium for dishonest dealing.

Besides, both the state which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. If the other party proceeds to the performance of the contract, expending his money and labor in the production of values, which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers. -*Bradley v. Ballard*, 55 Ill. 413.

Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void. *Bissel v. Mich. etc. R. R. Co.* 22 N. Y. 258.

The plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons. *Bissel v. Mich. etc. R. R. Co.* 22 N. Y. 258. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us.

The answer of the insurance company does not deny the averment

in the complaint that the company "was doing business in Larimer county, in the state of Colorado, as a general fire and hail insurance company." It does not deny that it entered into the contract of insurance with the appellee in manner and form as alleged in said complaint, nor that the contract was executed as averred. The sole defense upon which the appellant company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having nothing at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts would avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the states affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. It was in answer to the same point that Chief Justice Comstock observed, in his opinion in a leading case upon this question, that "a traveler from New York to Mississippi can hardly be required to fur-

nish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." *Bissel v. M. S. & N. I. R. R. Co.* 22 N. Y. 258. It was urged in argument on behalf of appellant that the state, which created these corporations for public good, has such an interest in their existence and perpetuity that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent, and the state may interpose to revoke their charters for an abuse thereof; but we take it that it is no more the public policy of the state to protect the business of private corporations than that of its individual citizens; and to invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretenses by holding that the party defrauded should be punished by the loss of his money or goods.

While such wrong may be prevented by interference on the part of the state, or stockholders of the company, it cannot well be said that to cure the evil it is necessary in every case to exempt the company from the liability of its unauthorized engagements.

The principle of estoppel by conduct is the same principle which is applied by courts in holding that the statute of frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud.

The essential elements of an estoppel by conduct are laid down by this court, in *Griffith v. Wright*, 6 Colo. 248, to be that: 1. There must have been a representation or concealment of material facts. 2. The representations must have been made with knowledge of the facts, unless the party representing was bound to know them, or that ignorance thereof was the result of gross negligence. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party should act upon it; but gross and culpable negligence on the part of the party sought to be estopped, the effect of which is to make a fraud on the party setting up the estoppel, supplies the place of intent. 5. The other party must have been induced to act upon it. The case before us seems to be fairly brought within the foregoing rules and definitions. The insurance company, through its agent, not only concealed the want of authority to insure against hail, which it now sets up, but its open notorious acts in soliciting policies of this character throughout the country impliedly held out and represented its authority for such business.

Such agent was certainly bound to know the extent of the authority of the company he represented, and if his acts in the premises were not done with full knowledge of the facts, his ignorance in this respect was gross and culpable negligence.

That the appellee was ignorant of the truth of the matter of want of



authority in the company is not denied by the appellant company, except by an inference which, it is argued, is to be drawn that the articles of incorporation and the record thereof furnished constructive notice of the extent of authority of said company. But it seems to us that such an inference is rebutted by the presumption fairly arising from the nature of the transaction, that the appellee would not have paid his money for the performance of a promise which he knew was void: that its performance could not be enforced, and that his money would be utterly thrown away.

That the offer of the appellant to insure, and the representations made to induce the appellee to enter into the contract of insurance, were made with the intent that the appellee should act thereon, is self-evident from the nature of the transaction, and the acceptance by the appellee of the offer so made by the appellant; and that the appellee was induced to act upon the offer and representations so made is equally apparent, for the act was an obvious sequence of the inducement.

It was strenuously contended by counsel for appellant in the oral argument of this case that whether the contract in a case of this kind is executed or not is immaterial; that the true grounds of liability depend upon, and should be placed upon, the fact of whether the elements of estoppel exist; whether the conduct of one party has been such as that the other party would be defrauded or injured thereby unless the contract should be enforced.

However this may be in respect to the other cases, or as a general rule, we are quite willing to assent to this view in the particular case before us, and to rest our decision upon the ground of estoppel by the conduct of the appellant company.

We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company, but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee *in statu quo*. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

— We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company as expressed and conferred by their articles of incorporation, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defense of the appellant company interposed against its liability on the contract is inequitable, unconscionable, and should not be allowed.

It is admitted that a contract is not enforceable when prohibited by statute; when not so prohibited, however, and when not illegal or immoral in its nature, nor contrary to sound public policy, a contract, even *ultra vires*, may be enforced, when, under the circumstances of its execution, every consideration of justice requires it. This is the ground of decision in most of the cases relied upon by the appellee in the case.

As is said by the supreme court of the United States in the case of *Zabriskie v. Cl., Col. & Cin. R. R. Co. et al.* 23 How. 400: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claim their own conduct has superinduced."

Among the many authorities examined in support of our views in this case, we cite the following: "*Parish v. Wheeler*, 22 N. Y. 503; *Bissell v. M. S. etc. R. R. Co.* id. 258; *Bradley v. Ballard*, 55 Ill. 413; *Whitney Arms Co. v. Barlow*, 63 N. Y. 69; *Darst v. Gale*, 83 Ill. 141; *State B'd of Agr. v. Citizens' Street Ry. Co.* 47 Ind. 407; *Oil Cr. etc. R. R. Co. v. Pa. Trans. Co.* 83 Pa. St. 166; *Argenti v. City of San Francisco*, 16 Cal. 255; *State of Ind. v. Woram*, 6 Hill, 37; *Converse v. Norwich & N. Y. Trans. Co.* 33 Conn. 180, modifying the doctrine in the case of *Hood v. N. Y. & N. H. R. R. Co.* 22 Conn. 502; *Chicago Build. Soc. v. Crowell*, 65 Ill. 453; *Ward v. Johnson et al.* 95 Ill. 215-240; *Zabriskie v. Cl., Col. & Cin. R. R. Co. et al.* 23 How. 398-401; *Hitchcock v. Galveston*, 96 U. S. 341-351; *National Bank v. Matthews*, 98 id. 621; *Manville v. Belden M. Co.* (McCrary, J. U. S. Cir. Ct.) 3 Col. Law, 558; Green Brice's *Ultra Vires*, 371, and cases cited; Sedgwick's *Stat. and Const. L.* 90; *Waterman's Specific Perf. Cont.*, cited *supra*.

The judgment of the court below is affirmed.

*Affirmed.*

BECK, C. J., and HELM, J., concurring. Private corporations are creatures of statute, and derive their powers solely therefrom. Upon

weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

But, for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.

*Affirmed.*

## SECTION IX.

*Obligation to restore what was Received under a Contract which has subsequently been Repudiated on the Ground of Ultra Vires.*

RE PHOENIX LIFE ASSURANCE COMPANY; BURGES  
& STOCK'S CASE.

1862. 2 *Johnson & Hemming*, 441.<sup>1</sup>

THE Phoenix Life Assurance Company was formed under the Joint Stock Companies Act (7 & 8 Vict. c. 110), under a deed of settlement, dated May 5, 1848, in which the business of the company was stated to be life assurance.

In 1858, the company, in accordance with a vote at a general meeting, commenced insuring marine risks. The company issued policies to Messrs. Burges & Stock on various vessels, on some of which losses occurred.

In 1860, an order was made for winding up the company.

Burges & Stock undertook to prove against the company for the amount of their claims on marine policies.

*Giffard*, Q.C., and *J. Russell*, for Burges & Stock.

*Kay*, for the creditors' representative.

*Fry* (*Sir H. Cairns*, Q.C., with him), for the official manager.

SIR W. PAGE WOOD, VICE-CHANCELLOR. [After deciding that the claimants would not be allowed to prove for losses upon marine policies:]

There is one point as to which I reserved my judgment, viz., whether Messrs Burges and Stock are entitled to prove for the amount of the premiums paid by them. It appears from the proceedings that the total amount of premiums received falls far short of the total payments made in respect of the marine business, but this cannot affect the rights of these claimants. They have had no consideration for the premiums they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received. The proof must therefore be allowed for the amount of the premiums paid.

<sup>1</sup> Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

BARONESS WENLOCK *v.* RIVER DEE CO.1887. *L. R.* 19 *Qu. B. Div.* 155.<sup>1</sup>

APPLICATION to vary the report of a special referee.

The facts were as follows : —

An action had been brought by the plaintiffs, as executors of the late Lord Wenlock, deceased, to recover from the defendants the amount of moneys advanced by the testator to them. The defence set up was in substance that the moneys had been borrowed by the company *ultra vires*. It appeared that the testator had advanced large sums of money to the defendant company. He had also paid off a previous advance of 56,000*l.* from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal the Court of Appeal varied his judgment, and, by order dated May 9, 1883, ordered that judgment should be entered for the plaintiffs for the amount of 25,000*l.* (that sum being the full amount which the company had power to borrow) and interest, and also that in addition thereto the plaintiffs should recover judgment for so much and so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, and interest from the respective dates of such employment, and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of 25,000*l.* as aforesaid, and the amount of the parts of the said sums so employed as aforesaid and the interest thereon. On appeal to the House of Lords they affirmed the decision of the Court of Appeal.<sup>2</sup> The special referee held an inquiry under the above order, upon which inquiry counsel were heard and witnesses examined, and he thereupon made a report. The plaintiffs now applied to the Court of Appeal to decide certain questions of law raised by such report and to vary the report in certain respects, and there was a cross application to vary such report by the defendants. Various questions arose on the report with regard to items allowed or disallowed by the referee, which the plaintiffs claimed to have allowed under the order of May 9, 1883, but which the defendants contended should be disallowed.

The questions raised were briefly as follows : —

In addition to the portions of the moneys advanced which had been applied to the payment of debts or liabilities of the company existing at the time of the respective advances the referee allowed, subject to the opinion of the Court, items in respect of portions of the moneys

<sup>1</sup> Statement abridged. Portions of arguments and opinion omitted. — *Ed.*<sup>2</sup> 10 *App. Cas.* 354.

advanced which had been applied in payment of debts and liabilities of the company which arose subsequently to the respective advances, whereas the defendants contended that he should have disallowed such items and allowed only items in respect of moneys advanced which had been applied in payment of debts and liabilities existing at the date of the advances.

[Omitting certain questions.]

The plaintiffs further claimed to be allowed under the order, in addition to the 25,000*l.* for which they had judgment as being validly borrowed, the amount of all debts and liabilities of the company paid out of that sum of 25,000*l.*

[After a preliminary objection to the application had been argued and disallowed, the main questions were argued.]

*Rigby*, Q.C., and *R. O. B. Lane*, for the plaintiffs. The terms of the order of May 9, 1883, include all debts or liabilities of the company paid out of the advances of the plaintiffs' testator whether existing at the date of the advances or not. The doctrine of equity by which the lender or quasi-lender of money borrowed by a company ultra vires is subrogated to the rights of a creditor of the company whose debt has been paid off out of the money so borrowed is not confined to cases where the debt was in existence at the time of the advance, but applies to all debts and liabilities of the company paid off out of the money so borrowed whether accruing before or after the advance. The principle upon which this equity depends is discussed in the case of *Blackburn Building Society v. Cunliffe, Brooks & Co.*,<sup>1</sup> and in the judgments in that case there is no trace of the limitation of the doctrine suggested by the defendants. If the company have had the benefit of the money so advanced by its application to debts or liabilities validly incurred by the company and which they were bound to meet, the person who has advanced the money is then subrogated to the rights of the creditors so paid off. The principle is that equity will follow the money, which remains in equity the property of the quasi-lender, and wherever it can find any security or piece of property representing the money, the quasi-lender is entitled thereto: and therefore, so far as the money has been applied for the benefit of the company, it is to be treated in equity as existing in the coffers of the company and must be repaid, not as money borrowed, but as money which still belongs in equity to the lender. The test is whether the transaction has added to the liabilities of the company, and, so far as the advance has been applied to debts or liabilities which the company has validly incurred, whether before or after the advance, the company's liability is not increased.

[Remainder of argument omitted.]

*Sir Horace Davey*, Q.C., and *A. R. Kirby* for the defendants. The order of May 9, 1883, must be construed with reference to what the Court may consider to be the correct doctrine of equity as to subrogation in such cases. It is contended that the view of the doctrine on

<sup>1</sup> 22 Ch. D. 61; also 9 App. Cas. 857, not on this point.

the subject contended for on behalf of the plaintiffs is far too wide and sweeping. The argument for the plaintiffs amounts to this: viz., that the rule which forbids borrowing money *ultra vires* is practically abrogated wherever it can be shewn that money so borrowed was applied to the purposes of the corporation, that is to say, that as between the directors and the shareholders it was not misapplied. The doctrine of *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.*<sup>1</sup> only applies to debts and liabilities existing at the time of the advance which have been satisfied out of it. So far as such debts and liabilities are concerned, it is clear that there has been no increase of the liability of the company. It is merely a substitution of one creditor for another. Altogether different considerations arise when the money borrowed is applied to payment of a liability subsequently incurred and which might never have been incurred if the money had not been borrowed. The extension of the equitable doctrine now sought to be made would have the most dangerous effects, as enabling companies practically to borrow without limit.

[LORD ESHER, M.R. But even if the doctrine be limited to debts previously incurred, the company have only to postpone the borrowing until after they have incurred the liability.]

The true principle is, that there is supposed to have been an assignment of the debt paid out of the advance to the person making the advance; that the quasi-lender really pays his money to the creditor and takes an assignment from him of the debt; but that supposed assignment is only applicable to the case of debts in existence at the time of the advance. In the previous cases on the subject the question arose with regard to existing debts.

It is clear that the plaintiffs' contention as to the debts paid out of the 25,000*l.* validly borrowed cannot be right, for the plaintiffs would be getting the same thing twice over if it were; and the terms of the order rightly construed exclude such contention. The money being validly borrowed was, when it got into the defendants' hands, the defendants' own money, and the equity to subrogation to the rights of the creditor cannot apply, for it depends on the doctrine that equity will treat the money borrowed as still remaining the quasi-lender's property, which only applies when the money is borrowed *ultra vires*.

*Cur. adv. vult.*

The judgment of the Court (Lord Esher, M.R., Fry, and Lopes, L.JJ.) was delivered by FRY, L.J. The questions which now require determination in this case arise from the application of the order of this Court of May 9, 1883, to the facts as found by Mr. Robinson, the special referee named in the order.

By that order it was directed that judgment should be entered for 25,000*l.* and interest, and in addition thereto for so much and so much

<sup>1</sup> 22 Ch. D. 61.

only of the sums advanced to the defendant company by the Rock Life Assurance Company and Baron Wenlock as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment. It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the direction in the order. The plaintiffs contend that all these advances are within the direction, and that the date of the accruer of the liability is immaterial. We are of opinion that the plaintiffs' contention ought to prevail. We are not at liberty to travel beyond or review the declaration contained in the order of May 9, 1883, which is binding on us not only as a decision of this Court but by reason of its affirmation by the House of Lords: and in our opinion the order rightly bears the wider construction. It is silent as to any limit of time within which the liabilities are to accrue, or within which they are to be paid: and by fixing the respective dates of the employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment and not of the advance is the material one. If the Court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it.

But we go further and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys: and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company: in the coffers of the company the money really advanced as a loan is still thought of by the Court as the money of the quasi-lender: and the Court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the Court. The true limit of the doctrine we conceive to be stated by Lord Selborne, L.C., in delivering the judgment of this Court in the



case of the *Blackburn Building Society v. Cunliffe, Brooks & Co.*:<sup>1</sup> "The test," said he, "is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and, if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." Now the payment of bonâ fide liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the company and therefore in no way transgresses the boundaries of the doctrine as laid down by this Court in the case to which we have referred. Sir Horace Davey forcibly warned us of the danger of the proposition which we have laid down, and said that it would afford to companies a facile means of evading the limit of their borrowing powers. But the danger appears to us imaginary. We do not think that capitalists will be found knowingly and willingly to advance money in the hope of recovering it on the ground of some future subrogation to the future rights of some future creditor. The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension of the doctrine will leave the plaintiffs heavy losers.

It is conceded that under the order of May 9, 1883, the plaintiffs are entitled to the 25,000*l.* and to so much of the sums advanced beyond the 25,000*l.* as was expended in satisfaction of the debts and liabilities of the company. The plaintiffs contend that they are entitled, in addition to all this, to so much of the 25,000*l.* itself as was so expended. They contend that this was given to them by the express terms of the order, and that the point, therefore, is not open to further consideration. We do not so read the order; for it appears to us that the 25,000*l.* is dealt with separately, in the first place, and that the rest of the order deals with sums in every respect outside of and beyond the 25,000*l.* The words in the order "in addition" exclude, in our opinion, all further consideration both of the borrowing of the 25,000*l.* and of its application. And in our opinion this is right in point of reason and principle: for the 25,000*l.* having been validly borrowed became part of the moneys of the company as much as the original

<sup>1</sup> 22 Ch. D. 61, at p. 71.

subscriptions of the members or the produce of sales of its lands: and no application by the company of its own moneys to the payment of its own debts can be conceived of as a transaction between a quasi-lender to the company and the creditors of the company, or lead to a subrogation of the creditors' rights to the stranger. If the plaintiffs were to be subrogated to the rights of those creditors who were paid with the 25,000*l.*, we do not see why they should not be subrogated to the rights of every creditor paid by the company with its own moneys from any source whatever.

[The matter was sent back to the referee with various declarations in accordance with the principles laid down in the foregoing opinion.]

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IN RE NATIONAL, &C. BUILDING SOCIETY.

EX PARTE WILLIAMSON.

1869. *L. R. 5 Chancery Appeals*, 309.<sup>1</sup>

THIS was a motion made by special leave of the Court of Appeal to discharge an order of the Master of the Rolls, whereby the *National Permanent Benefit Building Society* was ordered to be wound up.

The company was formed under the *Benefit Societies Act*, 6 & 7 Will. 4, c. 32, and commenced business in February, 1865.

The principal object of the company, as stated in the affidavit of Mr. *W. Richardson*, the secretary, was to provide a safe mode of investment for the funds of another society, called the *National Savings Bank Association*.

The rules contained the usual provisions for advancing money to members who held shares, and also contained powers of investing money in the hands of the directors; but there was no power to borrow money.

The prospectus, which was issued after the rules had been certified, contained the following announcement: "The directors have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members of course paying interest on the sums lent, until their turn arrives."

In September, 1865, the *Building Society* borrowed £400 from the *Savings Bank Association*, which was forthwith advanced by the directors of the *Building Society* to a member on mortgage security; and the mortgage deed was deposited with the *Savings Bank*, and the contributions of the member paid into the *Savings Bank*. In

<sup>1</sup> Arguments omitted. — ED.

January, 1866, the *Building Society* borrowed a further sum of £900, which was applied in advances to members, and secured in like manner. Shortly afterwards the *Savings Bank* stopped payment, at which time they had advanced £1300 to the *Building Society*. The *Savings Bank Association* was subsequently ordered to be wound up.

On the 13th of July, 1867, the Master of the Rolls made an order to wind up the *Building Society* as an unregistered company under Part 8 of the *Companies Act*, 1862. The order was made on the Petition of the official liquidator of the *Savings Bank Association*, who claimed to be a creditor for £1300 due to that Association.

A proof for that sum was afterwards admitted against the estate of the *Building Society*, and an order for a call was made upon the contributories for payment of it. From this order *J. W. Williamson* and others, who had been settled on the list of contributories, appealed.

When the appeal was opened before the Lord Justice Giffard it appeared that there was no debt due from the *Building Society* except the £1300 on which the winding-up Petition was founded; and as the ground of the appeal was that this debt was invalid, the Lord Justice directed notice of motion to be given to discharge the winding-up order. This having been done, the two applications came on together.

The principal promoters of the *Building Society* were also promoters of the *Savings Bank Association*, and *J. W. Williamson* and some others of the Appellants were directors or otherwise office bearers in both companies.

*Roxburgh*, Q. C., and *Cottrell*, for appellants.

Sir *R. Baggallay*, Q. C., and *Higgins*, for official liquidator.

SIR G. M. GIFFARD, L.J. In point of form this is an appeal from an order of the Master of the Rolls, but in reality the point on which I am about to determine this case was never brought fairly, or argued, before him, and therefore the matter is very similar to an original hearing before me.

The case, when it is examined, is a perfectly simple one, but before I go into it I will dispose of what Sir *Richard Baggallay* said as to the parties who are making this application, and as to the delay. I quite agree that in many cases delay may be of very great importance, especially if it has been shown that there have been sales of property or other dealings. I do not find in this case that anything of that description has taken place. Then, as regards parties, the nature of the case is such that I do not consider these parties personally disabled from bringing forward the case, more especially as they are not the only contributories on the list, they being about nine out of a number of thirty-six. But, although I think the winding-up order ought not to have been made, I certainly shall give them no costs.

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the Court in *Laing v. Reed*,<sup>1</sup> it was doubted whether, even if you put a

<sup>1</sup> Law Rep. 5 Ch. 4.

limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But, what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society shew that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules they are to receive certain loans.

After the rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued, and by that prospectus the directors chose to say "that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members of course paying interest on the sum lent until their turn arrives." If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound or was personally made liable in respect of any debt of the company.

This being so, let us see on what ground this winding-up order was made. It was made upon the Petition of a creditor, and in order to support that Petition the Petitioner must have made out that he was a creditor, either legal or equitable — either character would be sufficient. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money. There was no legal debt, and if no legal debt, the next thing to inquire is, whether there was an equitable debt? A class of cases has been referred to on that subject, the principal of which are *In re German Mining Company*<sup>1</sup> and *In re Cork and Youghal Railway Company*,<sup>2</sup> the latter of which was before the Lord Chancellor and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pitfield*,<sup>3</sup> where there was a loan to an infant, and the money was spent in paying for necessities, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those

<sup>1</sup> 4 D. M. & G. 19.

<sup>2</sup> Law Rep. 4 Ch. 748.

<sup>3</sup> 1 P. Wms. 558.

cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say, that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the *Savings Bank Association* that lent the money have or have not any right, either as against the property of this company, which was pledged to them, or as against the persons to whom this money was lent. If they have any such rights, they can only be asserted by filing a bill and taking a very different proceeding from that which has been taken here.

I am, therefore, of opinion that there is no legal or equitable debt. The winding-up Petition is in the nature of an execution against the company. Whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, they are not to be precluded from shewing that the title of the creditor to sustain a winding-up Petition totally fails, as it does in this case. The consequence is, that the winding-up order, the proof of the debt, and the order for the call must all be discharged. But, as I said before, the conduct of these parties has been such as to disentitle them to any costs.




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## IN RE GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

1882. *Law Reports, 23 Chancery Division, 440.*<sup>1</sup>

APPEAL from the Vice-Chancellor of the Duchy of Lancaster.

The Guardian Permanent Benefit Building Society was enrolled in the year 1870, under the 6 & 7 Will. 4, c. 32. The rules, as in similar societies, provided both for borrowing members (called advanced members) and for investing members (called unadvanced members). There was a rule that any member might withdraw unadvanced shares on giving one month's notice. Withdrawals were to be payable in rotation according to the priority of notice. The other facts sufficiently appear in the opinion of JESSEL, M.R.

*Ambrose, Q.C., Maberly, and Edwin Jones*, for appellant. [Argument omitted.]

<sup>1</sup> Only so much of the case is given as relates to a single point. The statement is abridged. — ED.

*Rigby, Q.C., and Hopkinson, for Mrs. Grace-Calvert.*

Although the borrowing did not create the regular relation of lender and borrower between Mrs. *Grace-Calvert* and the company, yet as between her and the members of the company who invited the loans and received the benefit of the money and had participated in the illegal act, important equities arise. The outside liabilities are only about £229, and will be easily provided for. The question now arises how the residuum is to be divided. The money advanced by persons in the position of Mrs. *Grace-Calvert* cannot be altogether traced, but it has been used for carrying on the business, and it is unjust that the shareholders who have had the benefit of the loans should divide the assets in priority to those who advanced the money. This applies to the unadvanced shareholders whose claims amount to more than £7400, and who claim to be paid in priority to us: *Wilson's Case*.<sup>1</sup> The borrowing was *ultra vires*, it was not illegal in the strict sense of the word; therefore there can be an equitable liability on those who borrowed it although we have no legal remedy. The doctrine laid down in *Barwick v. English Joint Stock Bank*,<sup>2</sup> is not applicable: *Chapleo v. Brunswick Permanent Building Society*;\* *Coltman v. Coltman*.<sup>4</sup> It is similar to the case of money paid by mistake; the person who paid it is entitled to recover it. It is a principle of the civil law which has been adopted into our law that no one can enrich himself at the expense of another.

[Remainder of argument omitted.]

*S. Hull*, for the unadvanced shareholders.

JESSEL, M.R. This is an appeal from the decision of the Vice-Chancellor of the County Palatine Court of *Lancaster*. The question is, how the assets of the society are to be disposed of, having regard to the very curious circumstances of the case. This is a building society with a rule which empowered the governing body of the society to borrow unlimited sums of money. This rule has been certified and been acted upon to a very considerable extent. But it is now well settled by the law that in such a society as this an unlimited power to borrow is not authorized, and that consequently such borrowing is beyond the powers of the society. Still, all has been done here perfectly *bonâ fide*. The persons who made the rule, as well as those who acted upon it by borrowing and lending, all acted under a common mistake in law that that was a lawful rule, and was binding on the society. To a great extent the borrowing has been from the bankers of the society, and the money so borrowed has been advanced to members of the society on mortgage securities in the usual way, who thereby became advanced members. A sum of about £7000 has also been received from unadvanced members, and has been employed in making loans in the same way. The borrowing from the bankers went on for a long time, and the sums borrowed were from time to time paid off

<sup>1</sup> Law Rep. 12 Eq. 516.

<sup>2</sup> 6 Q. B. D. 696.

<sup>3</sup> Ibid. 2 Ex. 259.

<sup>4</sup> 19 Ch. D. 64.

with money borrowed from other people, including the Respondent, Mrs. *Calvert*. In some cases the moneys advanced by these third parties were not applied in repayment to the bankers, but were lent to unadvanced members, and so these funds have got mixed up in a way which renders it difficult to say how far they have been applied in one way and how far in another. Under these circumstances, the society was wound up, and it appears that of the amount paid up, amounting to upwards of £81,000, £7000 odd has been obtained from the unadvanced members of the society, and the balance of the sum in question had been obtained in some shape or other from people who lent their money either without security or on equitable deposits or mortgages of property to the society, and the present Respondent is one of those persons. Such borrowing from her was unauthorized, and consequently her loan to the society did not create either a legal or equitable debt from the society to her, it being beyond the power of the society to incur any such debt. It follows, therefore, that the deposit or security which she obtained was a deposit or security for nothing; it was a deposit or security not authorized, and the result is, therefore, that she must give it up. Upon that point there can be no doubt whatever. But then what is to be done with the assets of the society? It is obvious that if the society realizes £81,000 worth of its securities, there will be about £70,000 odd of claims made which have arisen from the advances made by the persons who lent the society their money under the illegal rule. The actual figures will of course be considerably smaller, because the £81,000 will not realize so much by a very large sum. Still, after paying the strictly outside creditors and the sum subscribed by the unadvanced members, there will be a very large surplus to be disposed of. It is plain that it cannot be said on behalf of the society that the surplus so obtained ought to be retained by the members of the society. It was obtained by their own innocent mistake, because they had passed the rule authorizing the directors to borrow. They advertised for loans and so obtained the money. It was a mistake common to both sides. The surplus which arises from the advances so made must obviously on the plainest principles of equity be returned to the people who advanced. Nobody can have a claim upon it except those whose money it is. The actual money cannot be traced, but after the prior claims on the assets of the company have all been paid off the surplus must come to them, but with regard to the intermediate application of the surplus it must go to the outside creditors and the unadvanced members who have established a claim. The outside creditors had nothing to do with the adoption of the mistaken rule, they were not bound in any way, and they are therefore entitled to come upon the society and say that the assets were liable to satisfy their demands. Of the unadvanced members there are two classes, those who had given notice of withdrawal and those who had not; but for the purpose of the present judgment it is unnecessary to distinguish between them in order to determine their priorities. It cannot be said

that the unadvanced members of the society are not to take the assets. They have a right to claim payment out of the assets and it is impossible to point to any part of those assets as coming from any particular part of the money as distinguished from the rest. Their legal rights must therefore prevail, and they will accordingly be paid in priority to the other persons who would get the surplus. Of course, the costs of the liquidation must be paid in priority to every other claim. The proper decree to make will be to discharge the order of the Vice-Chancellor, to order payment of the liquidator's costs, then those of the Respondents; next, payment of the outside creditors, then of the ordinary unadvanced members, and then distribute the surplus *pro ratâ* among the persons who had advanced their money by way of loan upon those invalid contracts. The deeds must, of course, be ordered to be delivered up to the official liquidator.

COTTON and BOWEN, L.JJ., concurred.

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### MORVILLE v. AMERICAN TRACT SOCIETY.

1877. 123 *Massachusetts*, 129.<sup>1</sup>

COLT, J. The plaintiff paid five thousand dollars to the American Tract Society, under an agreement with the treasurer of that society that it should be repaid to him in case the society should not be allowed to retain its catholic condition, and unless fifty thousand dollars be raised within five years for evangelization purposes. A receipt for the money, signed by the treasurer, and reciting that agreement, was given to the plaintiff. There was a failure of one of the conditions named, but the society refused to pay the money back to the plaintiff.

The right of the plaintiff to recover the money so given was submitted by the parties to three arbitrators, by a submission entered into before a justice of the peace under the Gen. Sts. c. 147. An award in favor of the plaintiff was duly returned to the Superior Court, and many objections were there made by the defendant to its acceptance. It is necessary to consider only those which were relied on at the argument.

1. The defendant insisted that the contract made with the plaintiff and the submission to arbitration of the claims arising under it, were not within the chartered powers of the society.

[The learned Judge *held*, that the contract was *intra vires*. After expressing this view, the opinion proceeds as follows:]

There is another answer to this objection which is equally satisfactory. The question is upon the acceptance of the award; no question of pleading is involved. The award is binding, if in any form of action

<sup>1</sup> Statement and argument omitted. Only so much of the opinion is given as relates to a single point. — Ed.



the plaintiff is entitled to recover. If the defendant were to be allowed the full benefit of the point made, the plaintiff could only be prevented from enforcing his express contract. The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act.

The right to recover the money upon the implied promise, under like circumstances, has been heretofore recognized by this court.

In *White v. Franklin Bank*, 22 Pick. 181, where an express contract was made by a bank for the payment of a deposit at a future day certain, against the prohibition of the Rev. Sts. c. 36, § 57, it was held that, while no action could be maintained by the depositor upon the express contract, yet he might recover back the money, without a previous demand, in an action commenced before the expiration of the time, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract. The general proposition, that where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, it may be recovered back, was laid down in that case by Wilde, J., who declared it to be, not only consonant with principles of sound policy and justice, but to have been now settled by authority, whatever doubt may have been formerly entertained. "To decide," he adds, "that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition."

Again, in *Dill v. Wareham*, 7 Met. 438, where a town made a contract with reference to certain fisheries within its limits which it had no authority to make, and which it refused to perform, it was decided that the plaintiff might recover back money paid in advance on the contract, as money had and received by the town to his use.

The same principle is recognized in New York. *Utica Ins. Co. v. Scott*, 19 Johns. 1. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296. *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652.

[Remainder of opinion omitted.]

*Exceptions overruled.*

## NORTHWESTERN UNION PACKET CO. v. SHAW.

1875. 37 *Wisconsin*, 655.<sup>1</sup>

APPEAL from the Circuit Court.

The complaint alleges that plaintiff entered into a contract with the defendant to purchase of the latter 4,000 bushels of wheat, to be delivered from the mill of the defendant into the barge of the plaintiff immediately; that plaintiff paid the defendant \$1,000 on account of such purchase; that plaintiff furnished a suitable barge on the day the contract was made, but that defendant, though requested, failed to deliver the wheat or to repay the \$1,000 so advanced. The complaint also avers that the barge was detained for several days, and that the market price of wheat advanced immediately after the contract was made. Plaintiff seeks to recover: 1. The \$1,000 paid on account of the contract; 2. Damages for the breach of contract by the defendant; 3. Compensation for the value of the use of the barge while so detained.

Defendant's answer admits the making of the contract, the payment of the \$1,000, and the non-delivery of the wheat. The answer also alleges that it was the fault of the plaintiff that the wheat was not delivered; and contains a counterclaim for damages suffered by defendant by reason of the failure of plaintiff to perform the contract on its part.

The articles of incorporation of the plaintiff company contemplated that the business of the company should be confined to that of a common carrier of persons and property.

On the trial the circuit judge held that the plaintiff had no power to make the contract declared on, and the jury, under his direction, found for defendant. Judgment was entered on the verdict, and plaintiff appealed.

*Cameron & Losey*, for appellant.

*Wing & Prentiss*, for respondent.

LYON, J. [After discussing the question whether the contract was *ultra vires* on the part of the plaintiff.]

We conclude that the contract set forth in the pleadings, as to the plaintiff, is *ultra vires*, and that no claim for damages resulting from a breach thereof can be successfully asserted by either party. This disposes of the counterclaim of the defendant, and of all claims of the plaintiff except the claim to recover the \$1,000 paid on account of the attempted purchase of the wheat.

But the question remains whether the plaintiff is entitled to recover the \$1,000. If it can recover it, no good reason is perceived why it may not do so in this action. The complaint states all the facts essen-

<sup>1</sup> Statement abridged. Arguments and part of opinion omitted. — Ed.

tial to be averred in an action to recover the same, except that the plaintiff had no power to make the contract, and that omission may be supplied by amendment. Such an amendment cannot prejudice the defendant, for, in the progress of the case thus far, he has constantly asserted such want of power as a defense.

An extended discussion of the question will not be profitable. There are many adjudications in this country and in England, bearing upon it, some of which are cited in the brief of counsel for the plaintiff. The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received.

Many of the cases go farther, and sustain the action when some of the foregoing conditions are wanting. But the exigencies of this case do not require us to determine how far the rule may be extended, or what conditions may be omitted therefrom without defeating the action. The rule is here stated most favorably for the defendant; and yet it is clear that under it the plaintiff may maintain an action to recover the money paid on the invalid agreement. A contract to buy wheat is an innocent one; no statute has prohibited it; and this particular agreement is invalid only because of the accident, that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract.

In addition to the cases on this subject cited by counsel, the following will be found to sustain the views above expressed: *Bagott v. Orr*, 2 Bos. & Pul., 472; *Lowry v. Bourdieu*, Doug., 468; *Aubert v. Walsh*, 3 Taunt., 277; *Busk v. Walsh*, 4 id., 290. In *Thomas v. Sowards*, 25 Wis. 631, the rule above stated was applied. See also *Brandeis v. Neustadt*, 13 id., 142. But it is argued by the learned counsel for the defendant, that the case of *The M., W. & M. P. R. Co. v. The W. & P. P. R. Co.*, 7 Wis. 59, is an authority fatal to the plaintiff's right to recover. That was a mortgage given to secure the performance of an agreement which the court held to be *ultra vires*. It was, as Chief Justice WHITON said in the opinion, an action founded on the agreement and on it alone. The contract failing, the action failed as a matter of course. In strict obedience to the authority of that decision, we hold in this case, that so far as the action is founded on the void agreement, it cannot be maintained. Had that been simply an action to recover the amount paid by the plaintiff for the use of the defendant, it might have been decided differently. But it was not such an action, and the court did not determine whether such an action could be main-

tained. The case is not, therefore, an authority against the plaintiff's right to recover his advances on account of the void executory agreement.

*By the Court.* — The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A motion for rehearing was denied.

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## SECTION X.

### *Liability of Corporator where there is Crime, Tort, or Ultra Vires Contract on the Part of the Corporation.*<sup>1</sup>

#### BRUNDRED v. RICE.

1892. 49 *Ohio State*, 640.<sup>2</sup>

##### ERROR to Circuit Court.

Rice sued Brundred for money claimed to have been unlawfully exacted of him by the Cleveland and Marietta R. R. Co., as freight, on crude petroleum. The action was treated by both sides as an action of assumpsit for money had and received. It appeared that there was an agreement entered into between the R. R. Co. and Brundred *et als.*, that the R. R. Co. should charge all shippers of oil a certain rate, and should pay over to Brundred *et als.* (who were themselves shippers of oil) one half the freight so charged and collected. It also appeared that, soon after the making of the above agreement, a corporation styled the Ohio Transit Co. was organized under the laws of Ohio; and became, by assignment, a party to the above agreement, nominally acquiring all the rights of Brundred *et als.* thereunder.

Rice contended that Brundred *et als.* were the promoters of the Ohio Transit Co., caused it to be organized, and became and have always been its principal stockholders and its managing officers; and that they caused the Ohio Transit Co. to become a party (by assignment) to the above agreement for the purpose of carrying out their unlawful designs, and made use of said Transit Co., through their control of the same as its officers, to accomplish their unlawful purposes.

The defendants in their answer, among other things, set up that the Ohio Transit Company was a corporation duly organized under the laws of Ohio, and that they could not be charged with moneys received by it, on the ground set forth in the petition. But the court charged the jury

<sup>1</sup> See a later chapter as to statutory individual liability of stockholder for debts of corporation. — ED.

<sup>2</sup> Statement abridged. Arguments omitted. — ED.

that, "if you find by the greater weight of the evidence, that the assignment of the contract was a mere form; that the intention of the defendants in organizing this corporation was to make it a mere agency to receive this money, to be distributed to them under the contract, and according to their right in it as if there had been no assignment; the mere agent, I say, to hold the money for their benefit, why then, a payment to the corporation, under those circumstances, is a payment to them; and the plaintiff would have a right to recover as if it had been put in their hands."

Rice recovered \$1,823.75. The judgment was affirmed by the Circuit Court. Brundred *et als.* brought error.

*Nye & Oldham*, for plaintiffs in error.

*A. D. Follett, W. B. Loomis, and E. B. Kinkead*, for defendant in error.

BY THE COURT. [After deciding that the agreement between the R. R. Co. and Brundred *et als.* was against public policy; and that the shipper, on discovering the facts, might maintain an action against the party to whom the money had been paid over by the R. R. Co.]

It is claimed that the interposition of The Ohio Transit Company, an incorporation under the laws of Ohio, organized for the purpose of transporting petroleum through tubing and pipes, precludes a recovery against the defendants. If it had, in good faith, been organized for such purpose, there is no doubt but that the receipt of the money by it under the agreement, would constitute a defense to the action against the defendants. If, however, it was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense. The court fairly submitted this question to the jury, and in finding their verdict for the plaintiff, must have found the facts to be as averred in the petition. It is a stern but just maxim of the law, that fraud vitiates everything into which it enters. Deeds and records made in the most solemn form are set aside and held for naught when shown to have been effectuated for the purpose of fraud; and there is nothing so sacred in a certificate of incorporation as to take it out of the reach of this maxim.

*Judgment affirmed.*

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## PEOPLE v. ENGLAND.

1882. 34 *New York Supreme Court* (27 *Hun*), 139.

CERTIORARI to the Court of Sessions of the county of Schenectady, to review the conviction of the defendant upon an indictment charging him with publishing in *The Sun*, a newspaper, an advertisement of an illegal lottery.

*J. T. Schoolcraft*, district-attorney, for the people.

*N. C. Moak*, for the defendant.

LONDON, J. The evidence tended to show that the newspaper, "The Sun," in which the advertisement of the lottery was printed, was published by a corporation duly organized and known as "The Sun Printing and Publishing Association;" that its business was managed by a board of trustees; that the defendant was one of the stockholders of the corporation, and employed as its treasurer and purchasing agent, and superintendent of its business affairs. It did not appear that the defendant had any knowledge of the insertion of the advertisement.

Upon the trial the defendant, by his counsel, in various forms of request, asked the court to instruct the jury that he could not be convicted if he had no knowledge or notice that the advertisement was printed by the corporation; that the fact that he was a stockholder or treasurer or agent or employee of the corporation would not of itself be sufficient to convict him, if the corporation published the advertisement without his knowledge. The court held otherwise, and instructed the jury that if the advertisement was published by the corporation of which the defendant was a member, he was the publisher within the meaning of the statute.

A conviction based upon this instruction cannot, we think, be sustained.

If the corporation did the acts constituting the offense, it must have done them by the direction or permission of its officers, and by the personal act of some of its agents or servants. It seems reasonable that when the officer or servant of the corporation is held to answer *criminally* for the acts of the corporation, that he should be permitted to require that some evidence be given showing his connection with the acts constituting the offense. He, and not the corporation, stands indicted. To prove that the corporation did the acts does not *per se* prove that he did them; it must also be shown either that the corporation did them by his hand, act, direction or permission, which, of course, is direct proof of his own acts; or such circumstances must be shown as to justify the conclusion, as a fact, that what the corporation did he did; in other words, the circumstantial evidence may show that the defendant actually and personally did the acts which constitute the offense.

If the defendant must have had some actual, personal connection with the illegal acts, much more, it seems to us, must he have had some notice or knowledge that the corporation was engaged in such acts if done by another. Otherwise the defendant might be convicted because of an act done by the hand of another, and without his consent or knowledge. The fact that he is a member of the corporation whose servants did the act may be a circumstance, to be left in connection with others to the jury, from which they may, under proper instruction, determine whether the defendant had any actual participation in the illegal acts charged; but for the court to hold, as a matter of law, that such

membership charges him with criminal responsibility for the illegal acts of the corporation is, we think, wrong in principle, and unsupported by authority.

The conviction should be reversed and a new trial ordered.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment and conviction reversed and new trial granted.

## MILL v. HAWKER.

1874. *L. R. 9 Exch.* 309.<sup>1</sup>

DECLARATION. Trespass by taking locks off the plaintiff's gates. Plea: not guilty by statute. Issue.

Plaintiff is the occupier of land, through which there runs a path, across which the plaintiff placed gates which he locked. At a meeting of the highway board for the district within which the path is situated, the board took the position that the path was a public highway; and also passed a resolution directing their surveyor to remove the obstruction, which he did.

The plaintiff brought this action against all the members of the board, who had concurred in the resolution and against Wickett, the surveyor.<sup>2</sup>

At the trial no evidence that the *locus in quo* was a highway was given.

KELLY, C. B., ruled that the members of the board who had concurred in the resolution were not liable individually, and that Wickett was not liable. A nonsuit was ordered.

A rule was obtained to set aside the nonsuit and for a new trial.

Kingdon, Q. C., and Pinder (*Lopes*, Q. C., with them), showed cause.

Arthur Charles (*H. T. Cole*, Q. C., with him), in support of the rule.

*Cur. adv. vult.*

CLEASBY, B. The judgment I am about to read is that of my Brother Pigott and myself.

[The learned Judge *held*, that the surveyor, Wickett, was liable.]

As regards the other defendants who came to the resolution in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon

<sup>1</sup> Statement abridged. Arguments omitted. — Ed.

<sup>2</sup> So much of the case as relates to the liability of the surveyor is omitted. — Ed.

it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued: see *Attorney General v. Mayor of Liverpool*; <sup>1</sup> *Attorney General v. Bailiffs of Retford*.<sup>2</sup> There is, indeed, an express provision to this effect as regards the members of the highway board — but it is expressly limited to lawful acts of the board — in s. 9, subs. 6, of the Highway Act, 25 & 26 Vict. c. 61. And it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting ultra vires, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion. And in this case, unless the letter of the 30th November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the highway board given at the meeting, that is, of the 29th of November. The cases of *Taylor v. Dulwich Hospital*,<sup>3</sup> and *Reg. v. Watson*,<sup>4</sup> may, however, be referred to in support of the proposition that the individuals really do the act; and in the case of *Poulton v. London & South Western Ry. Co.*, and particularly in the judgment of Blackburn, J.,<sup>5</sup> the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is, whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.

<sup>1</sup> 1 My. & Cr. 171.

<sup>2</sup> 3 My. & Cr. 484.

<sup>3</sup> 1 P. Wms. 655.

<sup>4</sup> 2 T. R. 199.

<sup>5</sup> Law Rep. 2 Q. B. at p. 538.



KELLY, C. B.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character, but against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise or did exercise any personal authority or power. The resolution was the act of the corporation and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is *ultra vires*, and is not, and cannot be in contemplation of law, a corporate act at all.

In *Harman v. Tappenden*<sup>1</sup> the Free Fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected "That no action would lie to recover damages against individuals for acts done in their corporate capacity, and that non constat, but that all or some of the defendants might have voted against the order of amotion." When the case came before the Court upon a motion to enter a nonsuit and in arrest of judgment, the Court intimated very strong doubts on this ground how far the defendants were answerable in damages in their private character for acts done by them in their corporate capacity. And Lord Kenyon, C. J., said that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington*,<sup>2</sup> and *Rex v. Mayor of Rippon*,<sup>3</sup> and added, "that he had many years ago moved for a mandamus to the master and fellows of Wadham College to compel them to put the college seal to a return which they were required to make, and to which Mr. Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences, but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." Lawrence, J., expressed the same doubt, and, finally, upon cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged: see also

<sup>1</sup> 1 East, 555.

<sup>2</sup> Carth. 171.

<sup>3</sup> 1 Ld. Raym. 563.

1 Ventris, 351, and *Rex v. Windham*,<sup>1</sup> the case alluded to by Lord Kenyon. It is true that where individuals make a pretended corporate act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *Rex v. Watson*.<sup>2</sup> But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member, who, like Mr. Windham in the *Wadham College Case*, may have been opposed to the act in respect of which the action may be brought. It was, indeed, once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyns' Digest, Franchises, F. (19.). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable.

I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants execution might issue for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by ss. 20-27, and others.

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were ultra vires. But I apprehend that this is a misapplication of the term ultra vires. If the board, by resolution or otherwise, had accepted a bill of exchange directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been ultra vires, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass

<sup>1</sup> 1 Cowp. 377.

<sup>2</sup> 2 T. R. 199.

or the conversion of a chattel. If such an act is to be deemed ultra vires, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law. Two cases have, however, been cited which seem to bear upon the question against the defendants. But the first, *Poulton v. London and South Western Ry. Co.*,<sup>1</sup> merely shews that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand, in the Dulwich College case, *Taylor v. Dulwich Hospital*,<sup>2</sup> the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was ultra vires and not binding on the corporate body, and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which, being ultra vires, was absolutely void.

[The learned Judge held, that the surveyor was not liable.]

*Rule absolute.*

[The defendants appealed to the Exchequer Chamber from the above judgment rendered by the Court of Exchequer. The judges in the Exchequer Chamber were all of opinion that the surveyor was liable; and that, as far as regards the surveyor, the nonsuit at the trial was wrong. And they held, that, inasmuch as it was one nonsuit, where the parties were sued together in a single action, the decision that the nonsuit was improper as regards one, sets it aside as regards all, and that consequently the judgment of the Court of Exchequer, making absolute the rule for a new trial, must be affirmed. L. R. 10 Exch. 92. As to the liability of the members of the board, no decision was given. Upon that branch of the case, some of the learned judges expressed themselves as follows:]

BLACKBURN, J. Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous. Our decision would be of no assistance in sending the case down to trial, and would perhaps be an embarrassment to the learned judge who may have to try it. We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before, no better and no worse. On the new trial the facts will be ascertained, and the point reserved in such a manner that the Court before which it comes will be

<sup>1</sup> Law Rep. 2 Q. B. 534.

<sup>2</sup> 1 P. Wms. 655.

much better able to deal with it than they would be if they were to consider it now. (L. R. 10 Exch. pp. 92, 93.)

DENMAN, J. With regard to the question as to the corporators being personally responsible, I think that is a matter of great difficulty, and that it would be better not to send down the case with a divided opinion, or, by taking time to consider, to prevent the case from being tried at the next assizes. (L. R. 10 Exch. pp. 98, 99.)

ARCHIBALD, J. I entirely agree as to the inexpediency of taking time to consider the question as to the personal liability of the corporators, as to which there may probably be some difference of opinion. (L. R. 10 Exch. p. 99.)

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### SANDFORD *v.* McARTHUR.

1857. 18 *B. Monroe (Kentucky)*, 411<sup>1</sup>

THIS suit was brought by Sandford, who held a large amount in notes purporting to be notes of the Newport safety fund bank of Kentucky, all of less denomination than five dollars, against McArthur, who was, during its existence, the President of the bank. A judgment was asked against McArthur individually for the amount of said notes.

As appears by the charter of the bank, as originally passed by the legislature, all notes to be issued thereby were to be printed and engraved by the auditor of the state, and to be secured by the deposit of stocks or mortgages on real estate. Said notes were to be numbered and registered by the auditor, and countersigned by him before they were delivered to the president of the bank. By an amendment to the charter notes of a less denomination than five dollars were authorized to be issued without being countersigned by the auditor; this alone was dispensed with, all other provisions of the original charter remained unchanged by the amendment. Sandford, in his petition, charges that under color of this amendment of the charter the president, McArthur, confederated with others, some of whom were directors, and caused to be issued large amounts of notes of various denominations under five dollars, which were not received from the auditor, nor printed, nor engraved, nor numbered, nor registered, by him, and for the security of which no stocks, nor bonds, nor mortgages deposited with the auditor, but that McArthur, &c., caused said notes to be printed and engraved, and then issued as the notes of said bank, well knowing at the same time that such an issue was unauthorized, and in violation of the charter, and that this act was a fraud upon the persons to whom said notes were delivered, and of all others into whose hands they might come. It is alleged that the said notes

<sup>1</sup> Arguments omitted. — Ed.

were made payable to bearer, and on their face contained the promise of said bank to pay the same. They were received and passed in the community as legal notes, and being thus put upon the public they ultimately came, for a valuable consideration, into the hands of the plaintiff.

To this petition the defendant demurred, and assigned the following as causes of demurrer: 1. That the court had no jurisdiction of the case. 2. That there was a deficit of parties defendant. 3. That the petition shows no cause of action. The court overruled the demurrer as to the first and second grounds, but sustained it as to the third, and judgment was rendered for the defendant.

On a subsequent day of the term the judgment was set aside, and the plaintiff offered an amended petition, in substance averring that the notes so issued by the defendant purport to be the notes of said bank, but were not issued by the said bank, and were not the bills or notes of said bank; that they were made and passed by said defendant as a circulating medium, in lieu of and as the representative of money; but were not the notes or bills of any legally incorporated banking institution.

The defendant objected to the filing of the amendment. The court rejected the amendment, and rendered judgment in bar of the action. The plaintiff prayed an appeal.

*Stevenson & Kinkead*, for appellant.

*J. R. Hallam*, and *Geo. B. Hodge*, for appellee.

SIMPSON, J. It is not alleged in these cases that the plaintiffs themselves have had any dealings with the defendants or that they received from them the notes which they hold, or that they were deceived with respect to the value of these notes by any misrepresentations or concealment on the part of the defendants. Neither do they allege that they received them in consequence of any inducements held out by the defendants, or any promises made by them that they would be liable for them. They may be regarded, therefore, as having received them as the notes of the corporation, which they purported to be, looking to it for their payment, and relying upon its liability for the amount of them.

The only question, therefore, that arises upon this state of case is, has the board of directors made themselves personally liable for these notes to the holders thereof, by exceeding the authority which the charter conferred upon them, in issuing and putting them into circulation as the notes of the corporation, it having been heretofore decided by this court, in the case of *Watson vs The Bank*, that they were issued without authority?

The Directors are the agents of the corporation, and derive their powers not from the incorporators but from the charter, and cannot bind their principal beyond it. The charter did not authorize them to issue the notes held by the plaintiffs, nor is the corporation bound for them as its notes, although we suppose that it is liable for the amount of them so far as it received, and used any of the benefits or profits derived from

them. The holders may have a right to look to the general assets of the corporation, although they have no claim upon the fund set apart for the redemption of those notes which were issued in the manner prescribed by the charter.

It is a general principle, that where a person undertakes to do an act as an agent of another, and exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing; but this liability is founded upon the supposition, that the want of authority is unknown to the other party.

A distinction has been taken between acts of an agent for his principal in common cases, and similar acts done by the servants or officers of a corporation. In the first case it is said the extent of the authority is known only between the principal and agent, whereas, in the latter the authority is created by statute, to which all may have access who deal with the officers. (*Salem Bank vs Gloucester Bank*, 17 *Mass. Rep.* 29; *Angel & Ames on Corporations*, sec. 299.)

According to this doctrine it was the duty of those dealing with the officers of the corporation to know the extent of their powers, and to know whether the notes held by the plaintiffs were legally or illegally put into circulation. If they received them, knowing that they had been issued without authority, they cannot hold the officers personally responsible for them, inasmuch as the liability of the agent is founded upon the want of knowledge by the other party that he has exceeded his authority. The notes not having been stamped "secured by the pledge of state bonds and real estate," as required by the charter, carried on their face intrinsic evidence of the fact that they had not been lawfully issued, evidence which was visible to all persons, and which all persons receiving them were bound to notice.

Is the position correct, that it is the duty of those who deal with the officers of a bank to know the extent of the power conferred upon them by the charter under which they profess to act? We think it is as a general proposition. Although such corporations are private, yet as their notes are intended for general circulation, and the acts by which they are created are made public, and are of general interest, they do not properly fall under the denomination of private statutes, but must be classed with those that are general and public, or at least they should be considered as *quasi* public acts. The public, therefore, is as much bound to take notice of their provisions as they are to know the provisions of any of the statutes passed by the legislature.

It is a general rule that a party cannot rely upon his own ignorance of such matters, as it was his duty to know, and which he could have known by the use of reasonable diligence. If, for instance, an agent should refer the party with whom he was dealing to a recorded power of attorney as showing the extent of his authority, the latter could not hold the former liable on the ground that he had exceeded his authority in contracting in the name of his principal.

Here the charter containing the powers under which the officers

acted was published, and made accessible to all persons. Ignorance of its provisions must, according to well settled legal principles, be considered willful and inexcusable. Knowledge of them discharges the officers from all liability for having exceeded their authority, and as no other ground of liability is made out by the plaintiffs their action cannot be maintained according to the well settled principles of law by which such cases are governed.

It might, as a matter of public policy, be right to hold the officers of a corporation personally responsible whenever they transcended the powers conferred upon them by their charter, to the injury of the public. But, if such a liability be proper, it should be imposed by the terms of the charter, or by some general statute alike applicable to all corporations.

The defendants may have made themselves responsible to those persons with whom they had immediate dealings, if they were guilty of any fraudulent misrepresentations or concealments, but not being liable on the ground of a mere excess of authority, and the plaintiffs not having had any dealings with them, have not made out any valid cause of action against them.

Wherefore, the judgments are affirmed.



















